

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





# 74-1327

To be argued by  
JAMES P. LAVIN

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## United States Court of Appeals FOR THE SECOND CIRCUIT

Docket Nos. 74-1327, 74-1328,  
74-1339, 74-1499

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

BENJAMIN MALLAH, VINCENT PACELLI, JR.,  
ALFRED CATINO and BARNEY BARRETT,  
*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

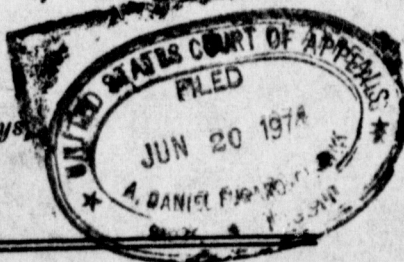
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### BRIEF FOR THE UNITED STATES OF AMERICA

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Benjamin Mallah, Vincent Pacelli, Jr., Alfred Catino and Barney Barrett appeal from judgments of conviction entered on February 26, 1974 and on March 15, 1974, in the United States District Court for the Southern District of New York, after a thirteen day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 73 Cr. 881, filed September 20, 1973, charged the four appellants and eight others—Alfred DeFranco, a/k/a “Skinny”, Ismael Torres, Peter Salanardi, Courtland Sample, a/k/a “Bucky”, Albert Perez, a/k/a “Abby Perez”, Al Bracer, Edgardo Ramirez, Jack Spada and John Fazzalari, a/k/a “Fuzzy”, in eight counts with various violations of the federal narcotics laws.\*

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\* Indictment 73 Cr. 881 superseded Indictment 73 Cr. 441 filed on May 11, 1973.

Count One charged all thirteen defendants and four additional co-conspirators, Herbert Sperling, Joseph Conforti, Louis Mileto and Barry Lipsky, with conspiracy to violate the federal narcotics laws commencing on January 1, 1971 and continuing until September 20, 1973, the date of the filing of the indictment.\*

Count Two charged Pacelli, Catino and Fazzalari with distributing and possessing with the intent to distribute two kilograms of heroin in September of 1971. Count Three charged Pacelli, DeFranco and Fazzalari with distributing and possessing with the intent to distribute two kilograms of cocaine in December of 1971. Count Four charged Pacelli, Perez and Ramirez with distributing and possessing with intent to distribute two kilograms of heroin in October of 1971. Counts Five, Six and Seven charged Mallah and Pacelli with distributing and possessing with the intent to distribute one kilogram of cocaine in July of 1971, two kilograms of heroin in November of 1971 and one kilogram of cocaine in December of 1971. Count Eight charged Perez with distributing and possessing with the intent to distribute approximately 121.7 grams of cocaine on November 18, 1971.

Trial commenced on December 18, 1973 as to the defendants Mallah, Pacelli, Catino, DeFranco and Barrett. At the conclusion of the Government's case, Judge Pollack granted motions for a judgment of acquittal on Counts Five, Six and Seven as to Mallah and on Count Four as to Pacelli. On January 8, 1974 the jury found the defendants Mallah, Pacelli, Catino and Barrett guilty on Count One, the conspiracy count. The jury also found Catino guilty on Count Two and Pacelli on Counts Two and Six. Pacelli was acquitted on Counts Three, Five and Seven, and DeFranco was acquitted on Counts One and Three, the two counts in which he was named.

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\* Additional co-conspirators were named in the Government's Bill of Particulars filed on December 5, 1973.

On February 26, 1974 Judge Pollack imposed the following sentences: Mallah was sentenced to a term of ten years imprisonment on Count One with a term of special parole of three years to follow and was fined \$25,000. Catino was sentenced to a term of twelve years imprisonment to run concurrently on Counts One and Two with a term of special parole of six years to follow and was fined \$25,000. Barrett was sentenced to a term of five years imprisonment on Count One with a term of special parole of three years to follow and was fined \$10,000. On March 15, 1974 Pacelli was sentenced to concurrent terms of fifteen years imprisonment on Counts One, Two and Six to run consecutively to a term of twenty years imprisonment which Pacelli is presently serving for violations of the federal narcotics laws with a term of special parole of three years to follow. Pacelli also was fined \$75,000 and was further ordered to pay the costs of prosecution.

Mallah, Catino and Barrett are at liberty pending this appeal.

### **Statement of Facts**

#### **The Government's Case**

##### **1. Introduction: Nature of the Conspiracy and Roles of the Appellants**

The four appellants, together with their co-defendants and co-conspirators, twenty-eight of whom were named either in the Indictment or in the Government's Bill of Particulars, were engaged in a conspiracy to distribute large amounts of heroin and cocaine in New York.

Eleven members of this conspiracy, including co-conspirator Herbert Sperling,\* were tried and convicted on July

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\*The other ten convicted conspirators are: Frank Bassi, Jr., Fred Berger, Jack Bless, Octavio Del Busto, Nelson Garcia, Norman Goldstein, Frank Serrano, Juan Serrano, Edward Schwararak and Luis Valentine.

12, 1973 after a jury trial before Judge Pollack on Indictment 73 Cr. 441.\* Their convictions are presently on appeal. Appellant Vincent Pacelli, Jr. was originally a defendant on trial in that case, but was granted a severance at the end of the Government's case when several defendants indicated they wished to call him as a witness. Mallah was a fugitive at the time of the *Sperling* trial, but was apprehended in August, 1973. The defendants Catino and Barrett were added as defendants in the superseding indictment.

The evidence at this trial established that the defendant Vincent Pacelli, Jr. and co-conspirator Herbert Sperling were the central figures within the conspiratorial organization which had as its purpose the purchase, dilution and distribution of large amounts of heroin and cocaine in the New York area.

Pacelli and Sperling each commanded groups of people who diluted, packaged, stored and delivered wholesale quantities of narcotics. Each also had suppliers and outlets for the drugs which they sold. Mutual need for sources of illegal narcotics resulted in an alliance between Sperling and Pacelli and their confederates. Pacelli, having good sources of cocaine sold cocaine to Sperling for resale to Sperling's customers, and Sperling, having good sources of heroin, sold heroin to Pacelli for resale to Pacelli's customers. Pacelli himself directed the purchase, processing and sale of heroin and cocaine within his sphere of the conspiratorial organization.

Among Pacelli's many customers was the defendant Alfred Catino to whom Pacelli sold kilogram quantities of heroin and cocaine.

The defendant Benjamin Mallah, Sperling's partner, provided large sums of money for the purchase of narcotics and received profits from its resale.

The defendant Barney Barrett delivered narcotics for Sperling to, among others, co-conspirator Reginald Williams.

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\* Indictment 73 Cr. 441 was superseded by the instant indictment (73 Cr. 881).



## 2. The Pacelli Group

### a. Barry Lipsky

In April 1971, Barry Lipsky, one of the Government's principal witnesses, who was then unemployed and living with a friend named Ben Febre in Manhattan, met with Vincent Pacelli, Jr., whom he had known since 1970. Pacelli told Lipsky that he had "something coming up in the near future" from which Lipsky could make "a nice piece of change" (Tr. 57-60).<sup>\*</sup> Within a short time, Pacelli brought Lipsky to an apartment at 1420 Third Avenue in Manhattan and inquired whether Lipsky would like to live there. One evening shortly thereafter, Pacelli telephoned Lipsky at Febre's apartment and requested that Lipsky meet him that evening at Directoire, a discotheque on East 48th Street in Manhattan. When Lipsky arrived there, Pacelli handed him the keys to the apartment at 1420 Third Avenue and instructed him to go there and wait until he arrived (Tr. 61-62). Lipsky went to the apartment. Later that evening Pacelli arrived with a suitcase containing ten kilos of heroin. After giving Lipsky some money, Pacelli instructed him to stay with the narcotics and informed him that he would return from time to time (Tr. 63).

Beginning with this incident in late April, 1971, and continuing until February, 1972, Lipsky served as Pacelli's chief assistant in the narcotics business. Lipsky received the drugs purchased by Pacelli, stored, tested, diluted and re-packaged them for distribution, and finally delivered them to Pacelli's customers. He accompanied Pacelli when the latter purchased drugs and when Pacelli received payment for narcotics which he sold. His duties also included converting Pacelli's narcotics proceeds from bills of small de-

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<sup>\*</sup> "Tr." refers to the trial transcript; "H." refers to the transcript of pre-trial hearings; "GX" to government exhibits; "DX" to defendants' exhibits; "App." and "Br." to the appendix and brief of the specified defendant.

nominations to large denominations (Tr. 80-81, 151). Lipsky not only served as an aide in Pacelli's narcotics activities, but also made the arrangements for Pacelli's wedding, which was held on June 6, 1971 and was attended by a dozen members of the conspiracy (Tr. 157-163; C 7).

At Pacelli's request, Lipsky moved into Apartment 2RS at 1420 Third Avenue in late April, 1971 and lived there until March 1972 (Tr. 64). The apartment\* served as the "stash" for Pacelli's narcotics until the fall of 1971, when the drugs and related paraphernalia were transferred to co-conspirator Susan Weyl's apartment at 55 East 9th Street in Manhattan (Tr. 155-57).

During the first two weeks that Lipsky lived in the 1420 Third Avenue apartment, Pacelli returned every day or so to pick up one or two of the packages of heroin from the initial ten kilo quantity (Tr. 63). It was during this period that Pacelli informed Lipsky that he had entered into a "partnership" in the narcotics business with "Abby" Perez and "Al" Bracer (Tr. 70-71).

In April, 1971, Pacelli taught Lipsky how to "mix" (dilute) heroin and cocaine and how to test the relative purity of each of these drugs (Tr. 71-80). Thereafter, Lipsky personally tested every package of heroin or cocaine which he received for Pacelli (Tr. 127-128).

## **b. Alfred Catino**

In May or June of 1971 Lipsky and Pacelli were at the Hippopotamus discotheque in Manhattan where Lipsky first saw the defendants Catino and Fazzalari. Within a week or two thereafter, Lipsky went with Pacelli and "Abby"

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\* On March 29, 1973 dust samples were collected at Lipsky's apartment and were found to contain traces of heroin and cocaine (Tr. 638-641, GX 11A, 11C, 11F).

Perez to 115th Street in Manhattan where Pacelli said he was to obtain some diluents for narcotics from Catino and Fazzalari.

In June or July of 1971, Lipsky accompanied Pacelli to a social club on 115th Street in East Harlem. Inside the club Pacelli introduced Lipsky to Catino and Fazzalari. Shortly after this meeting Pacelli again asked Lipsky to accompany him to the club where Pacelli stated that, "I think these guys want to buy some junk from me" (Tr. 113). Inside the club Pacelli, following a conversation with Fazzalari and Catino, told Lipsky that "we are going to mix up some junk for these guys and we will take their car" (Tr. 114). Catino then passed something to Pacelli. Pacelli and Lipsky proceeded to a red Chevrolet parked near the club and drove downtown. Pacelli let Lipsky off a block from 1420 Third Avenue and told Lipsky to go to the apartment and prepare to mix three or four kilos of heroin. Lipsky went to the apartment, and a few minutes later he admitted Pacelli who had parked the car. Pacelli and Lipsky then proceeded to mix three or four kilos of heroin which were then wrapped in half-kilo packages. The packages of heroin were then placed in a shopping bag. Pacelli instructed Lipsky to take the bag to Lexington Avenue and 80th Street, while Pacelli got the car. Lipsky, as instructed, went to the location and observed Pacelli arrive in the red Chevrolet. Pacelli drove around the block once, then stopped and got out of the car, opened the trunk and motioned to Lipsky to throw the bag containing the heroin into the trunk which Lipsky did. Pacelli and Lipsky reentered the car, and Pacelli drove back to the club on 115th Street where he parked and locked the car. Pacelli and Lipsky entered the club where Pacelli handed the keys and registration for the red Chevrolet car to Catino (Tr. 107-117).

During the summer of 1971 Pacelli and Lipsky returned to the club on 115th Street. There Pacelli met

with Catino and Fazzalari. Catino gave Pacelli a set of keys and a registration certificate, which Pacelli, in turn, handed to Lipsky. Pacelli then instructed Lipsky to mix two kilos of heroin for Catino and Fazzalari, place them in the red Chevrolet, return the car containing the drugs to the area of the club, and return the car keys to the club.

Lipsky left the club and located the same red Chevrolet which he and Pacelli had used during the previous transaction with Catino. Lipsky drove the car to his apartment at 1420 Third Avenue and there mixed 2 kilos of heroin. After he finished he returned to the red Chevrolet and put the heroin in the trunk. He then drove uptown and parked the car on First Avenue between 114th and 115th Streets. After locking the car Lipsky proceeded to 115th Street and entered the club where he gave the keys and car registration to Pacelli. Pacelli then went over to Catino and the two of them had a conversation (Tr. 118-119).

On another occasion, at Pacelli's instruction, Lipsky went to an apartment located above the club where he received \$5500 from DeFranco and Fazzalari (Tr. 122-123). In the fall of 1971 Lipsky, at Pacelli's direction, delivered one and a half kilos of cocaine to DeFranco and Fazzalari at the club. The cocaine had been stored at Susan Weyl's apartment on East 9th Street in Manhattan (Tr. 120-121, 124-125). Lipsky also delivered a kilo of cocaine to Catino at the club during this period (Tr. 126-127).

### **c. Nicholas Lugo and "Abby" Perez**

During dinner at the Yellowfingers Cafe, a Manhattan restaurant, one evening in October, 1971, Pacelli mentioned to Lipsky that "Nicky" would be coming to pick up some cocaine. Through a window of the restaurant, Lipsky saw Nicholas Lugo approach. Pacelli rose from his seat, told Lipsky to wait, and met with Lugo outside the restaurant. Pacelli spoke to Lugo, who gave something to Pacelli. When Pacelli entered the restaurant, he handed Lipsky a set of car



keys and a registration certificate underneath the table and described the car and where it was parked. Lipsky was instructed to prepare a half kilo of cocaine for Lugo, place the narcotics in the car, drive to East 106th Street and park the car, and then return to Yellowfingers (Tr. 101-103). Lipsky thereupon left the restaurant and located the car. He then drove to his apartment where he prepared the cocaine. After placing the narcotics in the trunk of the car, he drove to East 106th Street and parked. There he met Lugo, gave him the car keys and registration, and told him where the car was parked and where the cocaine was located (Tr. 101-104).

Approximately a month or two after this transaction, Pacelli told Lipsky that Lugo and "Abby" Perez had been doing "business" from a sporting goods store located on Third Avenue and 118th Street and expressed concern that one of their customers might be an agent (Tr. 105-106).

Special Agent Joseph Salvemini of the Bureau of Narcotics and Dangerous Drugs testified that on November 17, 1971 he and an informant went to L & A Sporting Goods, 2147 Third Avenue, New York, New York and arranged with co-conspirator Peter Aponte to purchase an eighth of a kilo of cocaine for \$1,800. On November 18, 1971 he purchased the cocaine from Aponte, Lugo and Perez. Salvemini arrested Lugo on January 19, 1972 (Tr. 611-625).

On the evening of Lugo's arrest, Lipsky, Pacelli, Ramirez, Pacelli's wife and sister-in-law and Cheryl Lugo were at the Auto Pub restaurant in Manhattan. Lipsky joined the group and was told by Pacelli that Cheryl Lugo had received a telephone call and that Lugo and Perez had been arrested by agents while driving a car. Pacelli then directed Lipsky to drive his wife and sister-in-law to Pacelli's apartment. He also stated that he and Cheryl Lugo would leave in her car to find out what had happened

and to see about what could be done to get Lugo and Perez out of jail (Tr. 106-107).\*

#### **d. Susan Weyl**

Susan Weyl testified that in the fall of 1971 she lived in an apartment at 55 East 9th Street in New York City.\*\* During this period she told Pacelli that she wanted to make some money. Pacelli replied that he would contact her or work out a way. Shortly thereafter, in November or December, 1971, Pacelli and Lipsky began storing heroin and cocaine in her apartment with her consent. Both Pacelli and Lipsky brought packages to her apartment and told her that they contained very pure quantities of heroin and cocaine. She also testified that she observed both Pacelli and Lipsky "cut" the white powder with another substance and then repackage it. Lipsky and Pacelli frequently visited the apartment and removed packages therefrom (Tr. 559-569).

### **3. Pacelli's Alliance with Herbert Sperling**

Lipsky testified that Pacelli frequently went to Ballantine Hair Stylists ("Ballantine's barbershop") located at 844 Seventh Avenue near 54th Street in Manhattan. The barbershop, which became the focus of intensive police surveillance (see *infra*, pp. 31-32), was the nerve center of the Sperling group's operations during the early period of Lipsky's association with Pacelli in May and June of 1971. Lipsky and Pacelli on occasion drove to the vicinity of the barbershop where Pacelli would leave the car to talk to people standing in front of the barbershop. On one such occasion Pacelli identified one person as "Louie" (Louis

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\* Samuel Bertolino, a bail bondsman, testified that on January 20, 1972 Pacelli and Cheryl Lugo came to his office at Baxter Street and told him that Nicholas Lugo had been arrested. A bail bond on which Bertolino assumed half the liability was written for Lugo on January 22, 1972 (Tr. 625-630).

\*\* In June 1973 Susan Weyl pleaded guilty to a narcotics conspiracy charge (73 Cr. 441) and was sentenced to a year of unsupervised probation (Tr. 559).

Mileto) and stated that "Louie" worked for Herbie. Pacelli also identified the defendant Mallah, stating "that's Benny Mallah, Herbie's junk partner" (Tr. 87, 95-96).

In May or June, 1971, Pacelli and Lipsky drove to Spring Street in Lower Manhattan where Sperling maintained an apartment. When they arrived, Pacelli entered number 5 Spring Street. When he returned to the car, he told Lipsky that "Herbie" wasn't there, but that he had left a message that they would be eating at a nearby restaurant called the Limehouse. They then drove to the restaurant. While they were eating, co-conspirator Louis Mileto entered the restaurant and was introduced to Lipsky. Mileto explained that he had been to Herbie's place, where he learned that they would be at the restaurant. When Mileto asked what they wanted, Pacelli said that they wanted to know whether Sperling had "any goods." Mileto replied that there was nothing immediately available (Tr. 82-86).

The first proven narcotics transaction between Pacelli and Sperling occurred shortly after the visit to Spring Street. Pacelli and Lipsky drove to Ballantine's barber-shop. After parking the car, Pacelli walked to the barber-shop, where he spoke briefly with Sperling, Mileto and Mallah. Pacelli, accompanied by Louis Mileto, then returned to Lipsky. Pacelli instructed Lipsky to obtain a set of car keys from Mileto, and after picking up the car, put a half-kilo of cocaine in it and then deliver the car and the drugs to Mileto.

After handing Lipsky a set of car keys and a registration certificate, Mileto told him that the car, a beat-up black Ford, was parked on Spring Street near the Bowery. They then arranged a time and place to meet. Lipsky then picked up the car on Spring Street and drove to his apartment at 1420 Third Avenue. Inside the apartment he packaged the cocaine. With the bag of cocaine secreted in the

trunk of the car, Lipsky drove to the vicinity of the place where he had agreed to meet Mileto and returned the car keys and registration to Mileto (Tr. 87-91, 93-94).

The second transaction with Sperling occurred in November, 1971 and involved the sale of two kilos of heroin to Pacelli. Pacelli and Lipsky drove to Sixth Avenue and 55th Street in Manhattan, where Pacelli parked the car, and left, explaining to Lipsky that he was going to see if he could pick up some "junk" from Sperling. When Pacelli returned, he gave Lipsky a parking claim check and a set of car keys. He instructed Lipsky to go to the Municipal Parking Garage on 53rd Street and pick up a gray, late model Thunderbird, in the trunk of which would be two kilos of heroin. Lipsky was further instructed to drive the car to the "stash", store the drugs, return the car to the garage and finally meet Pacelli at Ballantine's barber-shop (Tr. 131-133).

As directed, Lipsky went to the garage and picked up the car, which he drove to Susan Weyl's apartment. He removed a bag from the trunk of the car; inside the apartment he opened the bag and found four half-kilo bags of heroin. After determining that the heroin was the proper weight, he put the bags away. Lipsky then returned the car to the garage, obtained a new parking claim check and walked to Ballantine's barbershop, where he observed Pacelli, Sperling and Mallah in conversation. Lipsky and Pacelli walked around the corner where Lipsky handed Pacelli the car keys and claim check, upon which Lipsky noted the location of the car. After telling Lipsky to wait in Pacelli's car, Pacelli rejoined Sperling and Mallah and spoke briefly with them. Shortly thereafter, Pacelli joined Lipsky in the car, and they both left. When asked by Pacelli how the "goods" were, Lipsky reported that the weight was right (Tr. 131-134).

Pacelli and Lipsky drove to 118th Street in East Harlem. There Pacelli asked his aunt, Antoinette Bassi, for a pack-



age containing \$20,000. After receiving the money from Mrs. Bassi, Lipsky counted it, Pacelli and Lipsky then drove to Spring Street. En route Pacelli explained that they were going to pay Sperling. When they reached Spring Street, Pacelli took the money, instructed Lipsky to wait in the car, and left. A short while later Pacelli returned and mentioned that he had given Sperling \$20,000 and that he planned to pay Sperling an additional \$16,000 or \$18,000 which he owed on the deal in a few days (Tr. 135-136).

In November or December, 1971, Lipsky participated in a third narcotics transaction between Pacelli and Sperling involving Pacelli's sale to Sperling of a kilo of cocaine purchased from co-conspirator Juan Serrano, who Lipsky knew as "Negron".\* Pacelli told Lipsky that Juan Serrano had cocaine available for sale at \$12,000 per kilo which Pacelli could sell to Sperling at \$16,000 per kilo without diluting it (Tr. 143-144).

The following day Pacelli and Lipsky drove to the Cecil Tavern on Seventh Avenue in Manhattan, where Pacelli said he was to meet Sperling. Pacelli went into the bar, and a short time later returned to Lipsky with \$12,000 which Lipsky counted. They then drove to Shakespeare Avenue in the Bronx, where Pacelli entered Serrano's house with the money. A short time later Lipsky observed Serrano leave the house, get into a car and drive away. Within a short time, Serrano returned to his house. Thereafter Pacelli returned to Lipsky, removed a large bag from under his coat, and directed Lipsky to examine its contents. Upon driving back to Manhattan, Pacelli ordered Lipsky to go to Susan Weyl's apartment and there re-package the cocaine into two bags each containing 476 grams. The excess was to be stored in the apartment (Tr. 144-146).

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\* Juan Serrano was one of Pacelli's sources of cocaine (Tr. 96-101).

After completing his task, Lipsky returned to Pacelli with the cocaine, and they drove to Sixth Avenue and 55th Street. There Pacelli instructed Lipsky to wait in the car and left. A short while later, Pacelli returned, handed Lipsky a set of car keys and instructed him to deliver the cocaine by placing it in the trunk of the Thunderbird used in the previous transaction and located in the same garage. After making the delivery, Lipsky was to meet Pacelli at Ballantine's barbershop (Tr. 147).

Upon delivering the cocaine as directed, Lipsky, while walking toward Ballantine's was observed by Pacelli who was driving a car. Pacelli picked him up, and they returned to the barbershop. After directing Lipsky to wait in the car, Pacelli walked to Ballantine's barbershop and met with Sperling outside. Pacelli then entered the barbershop with Sperling. Lipsky observed Sperling, Pacelli and Mallah together inside. In a few minutes Pacelli left the barbershop, returned to his car, where Lipsky was waiting, and drove away. Pacelli told Lipsky that he had to go to Herbie's apartment on Spring Street that night to get the additional \$4,000 (Tr. 148-149). That night Pacelli told Lipsky "that's a very quick clean deal and I like to do a couple of those a week. These people that John Negron (Serrano) gets his coke from only work three months out of the year. . . . They have about 25 or 30 kis left and I am going to try and get John Negron to hold this coke for us and maybe I can get it all. If it's that good maybe Herbie will take it all" (Tr. 150).

The fourth transaction with Sperling occurred shortly before Christmas, 1971 and involved the purchase of two kilos of heroin by Pacelli for \$34,000. Lipsky testified that he and Pacelli went to the vicinity of Ballantine's barbershop, where Pacelli instructed him to wait in the car and then left. A few minutes later Louis Mileto approached the car and motioned Lipsky to open the door. Mileto got in and lay down on the floor, warning Lipsky that there were agents all over the area (Tr. 137-138).

At Mileto's direction, Lipsky drove to 57th Street while Mileto remained on the floor of the car. There they arranged to meet later. Mileto then took the car in which the heroin would be delivered, and Lipsky caught a cab to a friend's apartment where he remained several hours. Upon returning to the meeting place, a White Tower Restaurant on 57th Street, Lipsky found Mileto seated at the counter. After a brief conversation, Mileto handed Lipsky the keys to Pacelli's car and informed him that there were two kilos of heroin under the seat of the car, which was parked in front of Pemble's Restaurant on East 56th Street (Tr. 138-140).

Lipsky picked up the car and drove it to Susan Weyl's apartment. He removed a bag from under the seat, and when he reached the apartment, he found that it contained four half kilo bags of heroin, which he then weighed and "stashed". Lipsky then drove to 118th Street where he met Pacelli at the Bassi's apartment. Frank and Antoinette Bassi and Pacelli's sister, Loretta, also were present. Pacelli asked his aunt to get from a closet a package containing \$20,000 for use as partial payment for the two kilos of heroin that Mileto had delivered. Mrs. Bassi went into the bedroom and returned with the money, which Lipsky then counted and carried downstairs to the car. Pacelli and Lipsky then drove to Spring Street, where Pacelli left the car with the money and entered a building. When Pacelli returned, he stated that he had given Sperling the \$20,000 and that he owed him an additional \$14,000 or \$16,000 for the two kilos of heroin (Tr. 140-143).

#### **4. The Sperling Group**

##### **a. Louis Mileto**

Cecile Mileto, the widow of Louis Mileto, testified that in May, 1971 her husband told her that he had begun working for Herbert Sperling. She first met Sperling in July, 1971 at 5 Spring Street in Manhattan. She also saw

Sperling frequently thereafter at Ballantine's Barbershop \* in Manhattan and later at Sperling's new home in Bellmore, Long Island. Louis and Cecile Mileto themselves moved from a Queens apartment to Bellmore in the summer of 1971 (Tr. 34-40). While packing their belongings before they moved, Cecile Mileto discovered a large plastic bag containing white powder in the closet of her Queens apartment. Cecile Mileto, then a heroin addict, put a hole in the bottom of the bag and tasted the powder. She thought it to be a "cut" for heroin, but her husband Louis later told her it was pure heroin (Tr. 41-42).

Cecile Mileto accompanied her husband to a gas station on Gunhill Road in the Bronx owned by Joseph Conforti, whom they both had known for about ten years. She observed her husband on these occasions remove packages from the trunk of their car and put them in Conforti's station and at other times take packages from the station and put them in the car (Tr. 40).

Cecile Mileto also accompanied her husband when he delivered other packages. On one such occasion they went to a Wetson's restaurant on Queens Boulevard where she observed Louis Mileto remove a shirt box from the trunk of his car and give it to a person waiting in a car in the parking lot of the restaurant (Tr. 43-45). In the summer of 1971 she and Louis Mileto drove to Eva's Intimate Lounge in the Bronx. While Cecile Mileto waited in the car, Louis Mileto ran across the street into the bar. While he was gone, Cecile Mileto looked inside a paper bag which she found under the front seat. The bag contained a plastic bag filled with white powder. When Louis Mileto returned to the car, he took the package and brought it into Eva's Lounge (Tr. 45-46).

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\* On one visit to the barbershop Mrs. Mileto delivered three cans of "cut" to her husband (Tr. 51).



During the summer of 1971 Louis and Cecil Mileto went to 5 Spring Street where Cecile Mileto observed Sperling and Mallah standing next to the kitchen table on which was piled approximately eight to ten plastic packages of white powder. As Sperling placed the packages in a shopping bag, Mallah asked Sperling "are you going to have enough money for these?" (Tr. 204-205). The shopping bag containing the plastic bags of white powder was given to Louis Mileto. Mileto and his wife left Sperling's apartment and drove to their apartment in Elmhurst, Queens with the shopping bag in the trunk of their car (Tr. 205-206).

Shortly before Christmas, 1971, Cecile and Louis Mileto went to the apartment at 5 Spring Street. When they arrived they went into the living room where they met Sperling's wife Josephine. Benjamin Mallah and Sperling were seated by themselves at a table in the nearby kitchen. Cecile Mileto observed Sperling counting a large sum of money. While he was counting the cash, defendant Peter Salanardi entered the apartment with a paper bag containing more money which Sperling added to the sum he was counting (Tr. 47-49). After he finished counting, Sperling remarked that "\$75,000 isn't too bad a haul" (Tr. 50). The money was then placed in an attache case and given to Mallah who left the apartment (Tr. 50).

Cecile Mileto also identified the defendant Alfred Catino as a person whom she knew as "Al" and whom she had frequently seen at the barbershop with her husband, Sperling and co-conspirator Norman Goldstein, a/k/a "Sonny Gold". On one of these occasions Louis Mileto asked Catino "if he did what he was supposed to do?" (Tr. 206-211).

**b. Joseph Conforti**

Joseph Conforti testified that in June or July, 1971 Louis Mileto, whom Conforti had known previously, asked if he would store some packages containing "numbers receipts" in the storeroom of Conforti's gas station on Gunhill Road in the Bronx. Sometime during July or August, 1971, Conforti entered the storeroom, opened one of the boxes Mileto had left there, and discovered that the box contained white powder. When Louis Mileto returned to the gas station, Conforti inquired about the white powder. Mileto told Conforti that it was mannite and milk sugar used for cutting heroin. He also told Conforti that he worked for Herbert Sperling in the "junk" business (Tr. 646-650).

In July, 1971 Conforti accompanied Mileto on a trip to Philadelphia. On the way, Conforti was stopped for speeding by a State trooper. After Conforti returned to the car, Mileto stated that he was carrying a kilogram of heroin, opened his jacket and showed the package to Conforti. When they arrived in Philadelphia, Conforti remained in the car while Mileto left. Mileto returned in about twenty minutes and showed Conforti a shoe box covered with silver wrapping paper. Mileto told Conforti that he had just picked up \$60,000, opened the box and showed the money to Conforti (Tr. 650-652, 690-691). Conforti asked him if the money was for Herbie. Mileto replied no, that it was going to "Bennie", one of Herbie's partners. Mileto also told Conforti that "Bennie" was Herbie's "backup man for money problems, [that] if you needed money in the junk business, Bennie was there to give him money" (Tr. 653).

Mileto then rewrapped the package and returned with Conforti to the latter's gas station in New York. After he made a telephone call, Mileto told Conforti that he had to pick up some more money on 125th Street in Manhattan because the money picked up in Philadelphia was not enough. Mileto gave Conforti about \$6,000 to change into

large bills. Conforti changed the smaller bills for \$50 and \$100 bills at various banks. When Conforti returned to his station, he met Mileto who had obtained another \$17,000. Conforti and Mileto then placed the \$77,000 in a box and brought it to Sperling's Spring Street apartment. While Conforti remained in the car, Mileto carried the box containing the \$77,000 inside the building. In fifteen or twenty minutes Conforti observed Mallah leave the building carrying the box which Mileto had brought upstairs. When Mileto returned to the car, Conforti asked him to identify the man who had carried the money from the apartment. Mileto told him that the man was Ben Mallah (Tr. 653-656, 690-691).

Mileto thereafter continued to visit Conforti's gas station on a regular basis to pick up quantities of the mannite stored there (Tr. 656). In August 1971, Conforti told Mileto that he was planning to sell the gas station. Mileto asked him to wait several weeks so that Mileto could arrange to remove the mannite. After several weeks passed, Mileto reported that he had obtained an apartment in Queens where he could store the mannite and eventually removed it from Conforti's station (Tr. 657-658). The remainder of the material from the gas station was placed in a black trunk which Conforti and Mileto then brought to Zelma Vance's apartment (Tr. 659-660). Shortly thereafter Mileto took Conforti to Ballantine's barbershop on 54th and Seventh Avenue where Conforti was introduced to Sperling by Mileto. Mileto told Sperling that "this is the kid I was talking about, he can be trusted (Tr. 660-661).

Mileto persuaded Conforti to store four packages of what he initially said was "mix" in a trunk in the basement of Conforti's house. One night during October or November, 1971 Conforti received a telephone call from Mileto requesting him to bring one of the packages stored in Conforti's basement to Mileto at the Omaha Diner on

Queens Boulevard. When Conforti arrived at the diner, he handed Mileto the package in an adjoining parking lot (Tr. 662-692).

A couple of days later, Mileto went to Conforti's house and obtained the second of the four packages stored in Conforti's basement. Subsequently, in late 1971 or early 1972, Mileto telephoned Conforti and again requested him to bring one of the two remaining packages to the Omaha Diner. Conforti went to the diner and waited for Mileto. When Mileto arrived, he was angry because he said his customer did not have the money and explained to Conforti that they would have to wait. Conforti then handed Mileto the package and after leaving Conforti's car in the parking lot, they drove a short distance in Mileto's car to Zelma Vance's apartment at 96-07 57th Avenue, Rego Park, Queens, which Mileto frequently used in connection with his narcotics activities.\* When they arrived at the apartment, Mileto made several telephone calls. Finally he told Conforti that he was ready and asked him whether he wanted

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\* Zelma Vance, Mileto's girlfriend, testified that Mileto possessed a key to her apartment and often stayed there during the day while she was at work. Eventually he began paying the rent for the apartment. Sometime in October, 1971, Mileto brought a trunk (GX 55) to her apartment which he initially said contained "personal things." Later, he explained to Vance that the trunk contained "mixes." On four or five occasions, Mileto told Vance not to come home and stay overnight at a motel, which she did. Vance frequently received telephone calls for Mileto at her apartment, including calls from Herbert Sperling, whom she once saw with Mileto. Mileto often carried large sums of cash and once showed Vance a shoe box filled with money. On the night of February 10, 1972 she returned to her apartment and found that a "Joey was there." Joey left and returned the following day. Miss Vance later found a scale and "thousands" of small cellophane bags which she threw out (Tr. 982-994).



to take a ride to Brooklyn. Conforti declined the invitation, and so they both left the apartment and Mileto dropped Conforti off at the diner (Tr. 663-664, 692).

After this incident, Mileto asked Conforti to meet him at Zelma Vance's apartment. At the apartment Mileto proceeded to teach Conforti how to test the purity of heroin using heated mineral oil and a chemical thermometer. After testing a few packages of heroin in this manner, they both cleaned up and left the apartment (Tr. 664-666).

Subsequently, Conforti expressed concern to Mileto about the remaining package in his basement. In late January, 1972 Mileto telephoned Conforti and instructed him to bring the package to Zelma Vance's apartment. When he arrived at the apartment, Conforti found it filled with smoke which resulted from a fire that had started when mineral oil which Mileto had been heating to test some heroin began to burn. Mileto explained that another test would have to be performed and opened a trunk containing eight half kilos of pure heroin as well as testing equipment and mannite (Tr. 666-667; GX 55). After the bags of heroin were tested Mileto told Conforti that he had to telephone Sperling to tell him that the tests were good. After completing the call, Mileto taught Conforti how to "mix" (dilute) heroin (Tr. 668-671). The mixing procedure yielded twelve to fourteen half kilo bags of diluted heroin, two of which were kept aside and the balance stored in the trunk. After completing the job, Mileto advised Conforti that he had to make a delivery. He then took a kilo of heroin from the batch that they had processed as well as the package that Conforti had brought. Conforti became inquisitive and asked what the package he had brought to the apartment contained. At first Mileto said it was "mix", but finally admitted that in fact it was heroin, explaining that he previously had lied to Conforti because he did not want him to worry (Tr. 671-672).

**c. The Arrest of Co-conspirators Louis Mileto, Mark Reiter and Paul Carter on February 10, 1972**

The events leading to the arrest of Louis Mileto and co-conspirators Mark Reiter and Paul Carter, two of Sperling's customers, began at approximately 12:30 P.M. on February 10, 1972 when Special Agent John Pope and two informants went to Artie's Ice Cream Parlor, located at Second Avenue and 19th Street in Manhattan and there negotiated with Paul Carter for the purchase of three kilos of heroin at \$30,000 per kilo (Tr. 994-996, 1011-1012).

At approximately 3:30 P.M. that afternoon Pope and one of the informants returned to the ice cream parlor where they again met Carter, who explained that it would be necessary to go to a Wetson's restaurant located on Woodhaven Boulevard and Queens Boulevard.\* Pope and Carter then drove to Queens and stopped a half block from the restaurant. After Carter left the car and entered the restaurant, Pope drove his car into the adjoining parking lot (Tr. 996-97, 1012).

Seated in his car parked behind Wetson's, Special Agent Stuart Stromfeld observed Louis Mileto and Mark Reiter in a 1971 Buick parked directly in front of him. At approximately 4:10 P.M. both Mileto and Reiter stepped out of the Buick. While Mileto placed a call from a nearby public telephone booth, Reiter entered Wetson's where he joined Carter. After speaking briefly, both left the restaurant and went to their respective cars. Reiter spoke briefly with Mileto and then returned to the restaurant. When Carter returned to the restaurant, he had a lengthy conversation with Reiter during which Reiter twice left to speak with Mileto in the parking lot. Carter then returned to Pope and stated that the deal would have to be concluded at a later time. He and Pope then drove to Manhattan.

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\* The Omaha Diner described by Conforti is situated directly across the street from Wetsons (Tr. 1013-1014).

En route Carter told Pope to meet him at 9:00 P.M. on 57th Street and Second Avenue. Meanwhile, Reiter left Wetson's with Mileto, but was quickly dropped off and got into a white Eldorado Cadillac (Tr. 997-999, 1014-1016). Mileto went to Zelma Vance's apartment and told her that he would be at the apartment until about 11:00 P.M. She then left. Later in the evening, she telephoned Mileto and asked if she could return home earlier, but he said she should not (Tr. 987-988).

When Conforti returned home from work on February 10, 1972, he received a message that Mileto had telephoned and would call back. Within fifteen minutes, Mileto called again and asked Conforti to leave immediately and meet with him at 59th Street and Second Avenue in Manhattan. When Conforti arrived at the meeting place, Mileto told him to wait. About twenty minutes later Mileto returned and said that they would have to go to Zelma Vance's apartment and that he was going to deliver some heroin. When they reached the apartment, Mileto opened the trunk and removed two half kilo bags of heroin to which he added more heroin, stating that it was for a special customer. Conforti then mixed the heroin, wrapped and sealed the plastic bags and placed them in another bag. Before leaving with the drugs, Mileto expressed apprehension about the transaction and instructed Conforti not to move from the apartment until he heard from Mileto (Tr. 692-695).

At approximately 8:30 P.M. Special Agent Pope and one of the two previously mentioned informants arrived at 57th Street and Second Avenue where they met Paul Carter. Upon entering Pope's car, Carter stated that his "man" would arrive at 9:00 P.M. and that the deal would "go." At approximately 8:50 P.M. Carter exited Pope's car and entered the White Tower Hamburger Restaurant on 57th Street and Second Avenue where he was soon joined by Mark Reiter. After speaking briefly, they left the restau-

rant and Carter returned to Pope's car. Carter then reported that everything was ready and asked to see Pope's money. Pope showed him \$30,000. They also agreed that only one of the three kilos would be delivered that night. At Carter's instruction Pope entered a white Cadillac parked nearby, and he and Mark Reiter then drove to 55th Street between Second and Third Avenues. There, at Reiter's request, Pope again exhibited the \$30,000. Reiter then left the car and entered a brown Buick parked a few car lengths behind his own car (999-1002, 1016-1020).

At approximately 11:25 P.M. Reiter exited the brown Buick and returned to the car in which agent Pope was waiting. Reiter removed from beneath his coat a brown paper bag containing a kilogram of heroin wrapped in two plastic bags (GX 56E, 56F), which he handed to Pope. Moments later Reiter and Carter were arrested (Tr. 1002-1008, 1019-1021).

Special Agent Stromfeld, after arresting Carter, walked back to the car he had observed turn into the block. Recognizing the car as being the same brown Buick he had seen earlier that day at Wetson's in Queens, Stromfeld looked inside the car and observed a person lying down on the front seat. He tapped on the window and shouted until the person sat up. Stromfeld recognized him as Louis Mileto, and placed him under arrest (Tr. 1021-1022).

Later that night Conforti became apprehensive and telephoned Sperling to find out what had happened to Mileto. Sperling reported that Mileto had been arrested and instructed Conforti to remove the narcotics from Zelma Vance's apartment and deliver them to "Sonny Gold" (co-conspirator Norman Goldstein) at 48th Street and Broadway. After Zelma Vance returned to the apartment, Conforti packed the narcotics in the trunk, which contained three kilos of pure heroin, eight half kilos of diluted heroin



and some smaller bags of heroin, into several large bags. He later delivered the drugs to Goldstein (Tr. 695-697).

The following day, at Sperling's instruction, Conforti removed the mix and paraphernalia from Vance's apartment. On February 12, 1972 Conforti, again at Sperling's direction, brought all these items to a hotel on the East side of Manhattan. Conforti then went to Ballantine's barbershop, where he met Sperling and Goldstein. At Sperling's instruction, Conforti, accompanied by Goldstein, returned to the hotel where they removed the mix and paraphernalia which were then placed in Goldstein's automobile (Tr. 697-698).

The following day Mileto, having made bail, went to Conforti's house and told Conforti that he, Mileto, was in a lot of trouble. During their conversation Sperling called and asked Conforti if Mileto was there. After speaking with Sperling Mileto told Conforti that he had to go see Herbie (Tr. 698-699).

After Mileto left Conforti received a second call from Sperling and then went himself to Sperling's apartment at 5 Spring Street. When he arrived, he found Mileto in the bedroom with Sperling and Mallah. Conforti heard Sperling yell at Mileto for having extra packages of heroin which he (Mileto) was not supposed to have. Conforti also overheard Sperling tell Mallah, "I told you so", and Mallah's reply, "what could you do?" Mileto and Conforti left the apartment (Tr. 699-701).

In February, 1971 Louis Mileto told his wife that he had been arrested while delivering heroin to co-conspirator Mark Reiter. Shortly thereafter, in Bellmore, Sperling upbraided Mileto for doing business with Reiter (Tr. 54-55). He also told Louis Mileto, "I told you how to make deliveries. If you had listened to me, things like this wouldn't happen. This is coming out of your end. It is coming off the top" (Tr. 54-55).

#### **d. Reginald Williams**

Reginald Williams became acquainted with Sperling while both were in jail. In December, 1971, upon being released from jail, Williams went to Ballantine's barbershop where he met Sperling who, in turn, introduced him to Louis Mileto. Sperling instructed Louis Mileto to deliver some narcotics to Williams that night. The deal was cancelled, but a few days later Louis Mileto telephoned Williams and arranged a meeting at the Neptune Diner in Queens. Williams went to the diner and received a package of cocaine for which Mileto stated that payment of \$1,500 was due in ten days. After this transaction Williams frequently met Sperling and his associates at the barbershop. In May, 1972 Williams paid Sperling \$2500 for a package of narcotics delivered by co-conspirator Carlo Lombardi (Tr. 1042-1051).

On December 22, 1972 Williams went to the barbershop and told Sperling he needed a package of narcotics to make some money. Sperling promised Williams a package. While waiting, Williams spoke with defendant Barney Barrett in a bar next to the barbershop. Sperling called to Barrett to join him outside the bar, and then later Sperling called Williams outside. Barrett returned to the bar and told Williams to wait five minutes and then re-enter the bar. When Williams re-entered the bar, he met Barrett who told him to go into the bathroom. Williams did so, and a few seconds later Barrett entered the bathroom and handed Williams a package containing one half kilogram of heroin which Williams tested by injecting some of it into himself (Tr. 1051-1059).

**e. Sperling's Other Narcotics Workers: The Defendant Barney Barrett; Co-conspirators Norman Goldstein, Edward Schworak and Jack Spada**

In March, 1972 Conforti began processing narcotics directly under Sperling's supervision. On the first occasion, Conforti registered at the Bar Harbor Motel in Massapequa Park, Long Island on Sperling's instruction. He then returned to Sperling's home in Bellmore, Long Island, and picked up mannite from Sperling. Conforti and Norman Goldstein then returned to the motel where Conforti mixed either a kilo or a kilo and a half of pure heroin with the mannite. The mixing produced twelve to fourteen half-kilo bags of diluted heroin (Tr. 701-703).

Conforti and Goldstein mixed quantities of pure heroin ranging in size from two to two and a half kilos for Sperling on March 8 and 31, 1972 at the Bar Harbor Motel and on June 10, 1972 at the nearby Gateway Motel (Tr. 703-706; GX 14, 15).

In September, 1972 Conforti met co-conspirator Edward Schworak who, together with Norman Goldstein, assisted Conforti in mixing heroin for Sperling at the Bar Harbor and Gateway Motels on seven occasions during that month. Conforti testified that Sperling would deliver the mannite to him at a pizza store in Bellmore which he and Sperling owned. During the afternoon, Conforti would leave the store and engage a room at one of the motels where he would store the mannite and the mixing paraphernalia. In the evening Schworak and Goldstein would bring the heroin to the pizza store, and they and Conforti would then drive to the motel where Conforti would mix the heroin with the mannite while Schworak and Goldstein remained in the room. On almost every occasion Conforti diluted two to two and a half kilos of pure heroin which yielded twelve to fourteen half kilo packages (Tr. 707-710; GX 17).

In October, 1972 Conforti was introduced to defendant Jack Spada. Later that month Conforti went to Sperling's home and found Sperling and Spada mixing heroin on a pool table in the basement. Because Spada's hand had been injured, Conforti assisted Sperling in mixing and packaging the heroin, which filled approximately fourteen or eighteen half kilo bags. When the work was finished, the packages were placed in a brown paper bag which Spada took with him when he left (Tr. 710-712).

Between October, 1972 and April 14, 1973, the day when Conforti was arrested, Spada and Conforti, occasionally assisted by Goldstein mixed multi-kilogram quantities of heroin for Sperling on between twelve and twenty-four occasions at the Gateway and Bar Harbor Motels on Long Island, at the Skyline Motor Inn in Manhattan and at an apartment located on 54th Street between Seventh Avenue and Broadway kept for that purpose (Tr. 713-723).

On one occasion in the middle of November, 1972, Spada called Conforti and told him to go downtown to 54th and Broadway. Conforti met Spada, and both went to the 54th Street apartment. Inside the apartment Spada opened a closet and removed approximately three kilograms of pure heroin, which he and Conforti began diluting (Tr. 712-713).

While they were mixing, Barrett and Goldstein arrived. Spada told Goldstein that the heroin was not ready. Barrett and Goldstein left, and returned a half hour later. Conforti gave each of them five half kilogram bags of diluted heroin which they took from the apartment. After Conforti and Spada finished mixing the remainder of the heroin, they put four kilograms of diluted heroin in the closet, cleaned the apartment and left. The following day Spada met Conforti at the Stage Delicatessen on 54th Street and complained to Conforti that he had just delivered two and a half kilos of heroin to Barrett in a parking lot and Barrett had the customer right there (Tr. 713-716).



A few days later Conforti met Sperling, Schworak, Spada, Mallah and Barrett at the Stage Delicatessen on 54th Street. There Barrett told Conforti that if he ran low on his supply of mix, he should immediately ask Sperling or him for more. Barrett further said that Conforti should never wait until all of the mix was consumed, because it took time for Barrett to obtain mix from his connection with a drug warehouse (Tr. 716-717).

**f. John Capra, Leo Guarino and John Caruso**

In March, 1973 Sperling introduced Conforti to co-conspirator John Caruso at the Stage Delicatessen. After Sperling left, Caruso explained to Conforti that in the future he and Conforti would be mixing together. Upon leaving the delicatessen, Conforti met Spada who told him that Sperling and co-conspirators Capra and Guarino were now partners and that Caruso worked for Capra. Conforti then entered a cigar store on the corner where Sperling asked him to write his telephone number on a piece of paper so that Caruso could contact Conforti about making arrangements for delivery of the mix and the paraphernalia. Sperling handed Guarino the slip of paper containing Conforti's telephone number and Guarino gave it to Caruso. Capra then told Conforti: "Joe, just listen to him (Caruso), just do like what you are doing now. Just make sure you are not followed and everything is going to be okay" (Tr. 723-725).

A few days later Caruso gave Conforti two suitcases of mix at the Korvette's Shopping Center in the Bronx. Caruso also gave Conforti mixing paraphernalia, which Conforti took home. Later with Capra's and Sperling's approval, Conforti combined their mix and equipment (Tr. 727-730).

In late March or early April, 1973, Sperling telephoned Conforti and told him to go to the Stage Cigar store. When he arrived, Conforti found Sperling in conversation with Capra and Leo Guarino. When they finished talking, Sperl-

ing instructed Conforti to obtain \$30,000 from a closet in Sperling's house and bring it to him. Conforti thereupon drove to Sperling's home and obtained the \$30,000 with the assistance of Sperling's maid. He then returned to Sperling and handed him a bag containing the money (Tr. 730-732).

Shortly thereafter, Caruso telephoned Conforti and told him to stay by the telephone. On the following day, April 7, 1973, Conforti received a telephone call from Sperling who instructed him to take the "mix" and the paraphernalia to Long Island. Conforti then drove to the Bar Harbor Motel where he deposited the "mix" and the equipment. Conforti then drove to Sperling's home and gave him the name of the motel and the room number. Sperling stated that it would take some time before the others would be there. Conforti then returned to the motel and waited about five hours until Caruso arrived. Caruso brought approximately fifteen half kilos of pure heroin to be tested and said that they would have to wait until Spada arrived. Spada soon joined them, and they proceeded to test the heroin, which proved to be pure. Spada then left to telephone Sperling. When he returned, Conforti, Caruso and Spada mixed approximately two and a half kilos of pure heroin which Conforti placed in plastic bags. Caruso took the heroin and left with Spada, while Conforti remained at the motel to clean the equipment and the room (Tr. 732-736; GX 19).

On April 10, 1973 Conforti, Caruso and Spada met at the Gateway Motel and mixed two and a half kilos of heroin (Tr. 736-738; GX 20). On April 13, 1973 Conforti and Caruso, at Sperling's instruction, met at the Bar Harbor Motel where they mixed another two and a half kilos of pure heroin (Tr. 738-741; GX 21).\*

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\* Dust samples collected by a government chemist on May 15, 1973 from rooms at the Bar Harbor Motel which Conforti used were found to contain traces of heroin (Tr. 1281-1284; GX 58B, 58C, 58G).

### **g. Surveillance of Ballantine's Barbershop**

In July, 1971, the New York City Police Department began conducting surveillance of the conspiratorial activity that centered in and around Ballantine's barbershop. The Hotel Wellington, situated one block from the barbershop, served as the principal vantage point from which the surveillance was conducted. Employing a variety of visual, photographic and electronic techniques, the surveillance team gathered voluminous evidence of the conspiracy's operation during 1971 and 1972.

Photographs taken by the police from the Hotel Wellington during July, 1971 captured numerous meetings among the conspirators in the vicinity of Ballantine's barbershop. Government Exhibit 8 depicted the defendant Pacelli, standing in front of the barbershop. Government Exhibit 9 taken in July, 1971 showed Pacelli standing in front of the barbershop next to Louis Mileto and Sperling standing on the corner a short distance away (Tr. 52-53, 136-137, 1129-1130).

In addition to Pacelli, Sperling and Mileto, Guarino, Goldstein, Sample and Salanardi were among other co-conspirators photographed during meetings in front of the barbershop in July, 1971 (GX 8, 9, 60). Additional photographs showing meetings among these and other co-conspirators during the period from July, 1971 until October, 1972 were received in evidence (Tr. 1113-1132; GX's 61, 61A-61H, 62-71).

In August, 1972 the police devised a plan which they hoped would enable them to listen to conversations of the conspirators outside Ballantine's barbershop. On August 16, 1972 Patrolman Gerald Lino was concealed in the trunk of an El Dorado Cadillac which was parked in front of 844 Seventh Avenue near the barbershop. Four holes had been drilled in the trunk of the car to provide air for Lino, and the right rear fender light had been removed so that he could make observations while secreted in the trunk (Tr. 1133-1135, 1176-1177).

On August 16, 1972 at approximately 3:20 P.M., Lino overheard the following conversation between Sperling and Mallah:

Sperling: "I got to have the stuff."

Mallah: "Don't worry about it."

Sperling: "Fifty thou, right?"

Mallah: "Yes, right, fifty, fifty."

Sperling: "But I got to have it. You know I need it."

Mallah: "Don't worry about it. I'll see the people this afternoon, tonight or early tomorrow, you should have it."

Sperling: "But I need it."

Mallah: "Don't worry about it. If the people were straight, if they are not on the run, we should have it" (Tr. 1182-1183).

Lino then observed Mallah and Sperling enter the Gold Rail Bar. Barrett then left the bar and approached Goldstein. Lino overheard the following conversation between Barrett and Goldstein:

Goldstein: "What's up? Are they going to get it?"

Barrett: "I don't know."

Goldstein at this point told Barrett to go back in the bar and find out. Barrett entered the bar and came out a few seconds later and told Goldstein, "Yes, we should have it tomorrow" (Tr. 1183-1185). During these conversations Sergeant DeLuca, in contact with Lino by walkie-talkie, took photographs from his observation post in the Hotel Wellington (Tr. 1133-1137; GX 61A-61D).

#### **h. The Arrests of Sperling and Conforti**

On April 14, 1973 at approximately 5:00 A.M., Sperling was arrested in his 1973 Mercedes automobile near his home in Bellmore. Dust samples collected from beneath a



rubber mat in the trunk of Sperling's car were found to contain traces of heroin (Tr. 1030, 1285, 1291; GX 59B-59E).

Conforti also was arrested on the morning of April 14, 1973. The trunk of his car contained approximately 20 lbs. of mannitol and lactose wrapped in plastic bags and a green suitcase containing narcotics paraphernalia (Tr. 742-763, 1287-1290; GX's 41A-53B).\*

#### **i. The Arrests of Catino and Mallah**

Special Agent Mortimer Moriarty arrested Catino on September 26, 1973 in the Bronx. When arrested, Catino was carrying a paper bag containing a box of eight chemical thermometers, each approximately twelve inches in length and having a maximum reading of 300 degrees Fahrenheit (Tr. 1251-1256, 1429; GX 54, 54A-54H).

On April 13, 1973 Indictment 73 Cr. 330 \*\* was filed charging the defendant Mallah and others with conspiracy and substantive violations of the federal narcotics laws. A bench warrant was issued for Mallah's arrest on the same day (Tr. 1272; GX 80, 81, 82). Special Agents of the Drug Enforcement Administration made efforts to locate the defendant Mallah from the time the bench warrant was issued. They interviewed witnesses and traveled to Miami, Florida in June, 1973 in an unsuccessful attempt to locate Mallah (Tr. 1269-1271).

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\* The paraphernalia included mineral oil, a heater, test tubes, eye droppers, masks, plastic bags, a thermometer, a scale, spoons, rubber gloves, a sealing machine and a can of deodorant spray used to mask the odor produced by heroin.

\*\* Indictment 73 Cr. 330 was the first indictment in this case. It was superseded on May 11, 1973 by Indictment 73 Cr. 441 which went to trial before Judge Pollack on June 18, 1973. 73 Cr. 441 was superseded by Indictment 73 Cr. 881 on September 20, 1973. Each of these indictments dealt with the same conspiracy.

Nancy O'Malley and Mallah were together in Hallandale, Florida on April 15, 1973. There Mallah told her he was going downstairs, and when he returned told Nancy O'Malley, "There's been some trouble. I have to leave." Mallah then packed his bags and left Miss O'Malley's apartment (Tr. 1281).

On August 18, 1973 Mallah was arrested in an apartment located at 420 East 66th Street, in Manhattan. The apartment was leased in the name Morris Geller. Among the papers found on Mallah and in the apartment was a bank identification card in the name of Morris Geller but bearing Mallah's picture in which he was shown wearing a toupee (Tr. 1266; GX 74, 75, 76). There was also a bank book, an application form for a social security card dated August 7, 1973 and a receipt for a television set, all in the name of Morris Geller (Tr. 1260-1262; GX 72, 73, 77).

Mallah also possessed a second set of identification papers consisting of a Florida driver's license, a Florida bank savings book, a Florida rent receipt and a social security card, all in the name of David Barton. No identification was found in the name of Benjamin Mallah (Tr. 1262-1269; GX. 78). \$8,552.56 was also taken from the defendant Mallah and from the apartment at the time of the arrest. \$5,000 of that consisted of one hundred dollar bills (Tr. 1263; GX 79).

## **The Defense Case:**

### **1. Benjamin Mallah:**

Six witnesses testified that they placed bets with Mallah at the Stage Delicatessen and that they knew him to be a bookmaker (Tr. 1323-1355).

Mallah testified that he was a bookmaker and that prior to his trial he never met the defendants Pacelli or Catino. He also denied knowing Jack Spada, Joseph Conforti or

Cecile Mileto. He stated that he knew Herbert Sperling for three to four years and that Sperling used to place bets with him. Mallah also denied receiving \$75,000 from Sperling and denied receiving an attache case containing \$75,000 from Sperling at 5 Spring Street. He denied being in an apartment on Spring Street or ever being in the Stage Delicatessen with Joseph Conforti whom he also denied ever meeting.

He also denied ever asking Sperling at Spring Street in Cecile Mileto's presence, "Do you have enough money to cover this?"

Mallah further testified that he used the name Barton, as well as other fictitious names including Geller, Scott, Stein and Rosen because of his business. He admitted leaving Florida in April 1973 stating that it was because he had received word that a subpoena had been issued for him in Miami in connection with his gambling activities and not because he had heard that he had been indicted for narcotics violations in New York. Mallah also admitted renting an apartment in New York under the name Morris Geller and wearing a toupee often. He stated that he had a total of \$9,700 on his person and in his apartment at the time of his arrest and not the \$8,500 as the agents had testified. Mallah also denied ever using or hearing the expression "50 thou" or ever being told by Sperling that, "We have to get the stuff (Tr. 1365-1384).

On cross-examination Mallah admitted signing a receipt that \$8,552.06 was seized from him at the time of his arrest (Tr. 1386-1387; GX 83). Mallah also denied knowing or ever meeting Louis Mileto, nor could he identify Louis Mileto's picture. Mallah also denied being in Sperling's apartment building in 5 Spring Street or ever being inside 5 Spring Street on July 30, 1971 with Sperling and Mileto. He denied ever giving Mrs. Mileto a couch. Mallah denied having the conversation with Sperling on August 16, 1973 as testified to by Patrolman Lino (Tr. 1387-1397).

Mallah also testified that he had read in the newspapers in April, 1973 that Sperling had been indicted, but said that he did not find out he (Mallah) had been indicted until he was arrested in August, 1973.

## **2. Alfred Catino**

Carl Abraham, Director of Inter-City Testing and Consulting Corporation, testified that the eight thermometers seized from Catino at the time of his arrest were 300 degree Fahrenheit thermometers, that if converted into centigrade the maximum reading would be 148.9, and that a thermometer with a maximum grade reading of 300 degrees Fahrenheit could not measure 180 degrees centigrade. Mr. Abraham also testified that the Fahrenheit thermometers seized from Catino had many uses, including checking the temperature of a freezer (Tr. 1427-1440).

Catino did not testify or present any other evidence.

## **3. Vincent Pacelli, Jr.**

Gloria Luloff testified that she knew Susan Weyl for more than seven years. Weyl told Luloff in 1971 that she was living with a boy named Barry and that she and Barry were in love. Luloff met Barry and Miss Weyl together at the Hippopotamus discotheque in Manhattan in 1971. Luloff testified that Susan Weyl's reputation for truth and veracity was that of a liar and a sneak (Tr. 1440-1447).

On cross-examination Luloff admitted knowing Pacelli for a couple of years. Although she claimed to have seen the "Barry" Miss Weyl told her about at least six times, Luloff was unable to identify a picture of Barry Lipsky (Tr. 1447-1450).

James Gannon, a United States Probation Officer, testified that he was assigned as the probation officer of Barry Lipsky in November, 1971 and that Lipsky at that time



told him he was living with a girlfriend named Susan Weyl on East Ninth Street in New York City, Mr. Gannon never made any attempts to verify this (Tr. 1451-1454).

By stipulation the testimony of deceased Detective Joseph Nunziata given at an earlier trial and concerning his surveillance of co-conspirator Louis Valentine in September, 1971 was made part of the record.

Pacelli did not testify in his own behalf.

#### **4. Barney Barrett**

Barrett did not testify or offer any evidence.

#### **The Government's Rebuttal Case**

Special Agent Michael Waniewski, one of the DEA agents who arrested Mallah on August 16, 1973, testified that at DEA headquarters he told Mallah that approximately \$8,550 had been seized from him and asked Mallah to verify his count. Mallah then stated, "O'kay, I trust you." Waniewski insisted that Mallah count the money, after which Mallah said, "I agree with your tally" (Tr. 1468-1473).

Police Sergeant Fortunato De Luca was recalled and testified that while conducting surveillance of Ballantine's barbershop on July 14, 1971, he observed Mallah arrive and then a short time later observed Louis Mileto and Herbert Sperling arrive. Sergeant De Luca, at one point during the day, also saw Mileto and Mallah engage in a short conversation in front of the barbershop (Tr. 1473-1474).

On July 30, 1971 Sergeant De Luca conducted surveillance of 5 Spring Street. At about 7:15 P.M. he observed Louis Mileto enter 5 Spring Street. At about 7:30 P.M. he observed Mallah and Herbert Sperling walking in the area. Both of them entered 5 Spring Street at about 8:30 P.M. At about 8:45 P.M. he observed Louis Mileto leave 5 Spring Street and hail a cab (Tr. 1475-1476).

Mark Miklitsch, the fifteen year old son of Cecile and Louis Mileto, testified that he met Mallah on a few occasions in 1971. In August of that year, he and Louis Mileto went to Mallah's apartment to obtain a couch and a chair and that at that time Louis Mileto and Mallah had a conversation. Mark Miklitsch also saw his father, Sperling and Mallah talking together in Ballantine's Barbershop. He also was present in an apartment at 5 Spring Street on one occasion with his father and mother, Herbert and Josephine Sperling and Benjamin Mallah (Tr. 1480-1485).

## **ARGUMENT**

### **POINT I**

**The evidence amply established Mallah's participation in the single conspiracy charged in the indictment and proved at trial.**

Mallah argues that the evidence against him was insufficient to support the guilty verdict. He also contends that the proof at trial established multiple conspiracies. Neither argument has merit.

#### **1. The sufficiency of the evidence**

The evidence at trial independent of the hearsay statements of his co-conspirators amply established Mallah's participation in the narcotics conspiracy charged in the indictment. The evidence showed that in the summer of 1971 Mallah was present with Herbert Sperling at the latter's Spring Street apartment and was overheard asking Sperling if he "had enough money for that." The "that" to which Mallah referred was eight to ten plastic packages containing white powder which were piled on a table near him. (Tr. 204-205, 233-235). The packages were placed in a shopping bag and given to Louis Mileto, then Sperling's principal narcotics worker (Tr. 205-206).

Again during the summer of 1971 Joseph Conforti accompanied Louis Mileto to Philadelphia where Mileto delivered a kilogram of heroin to Sperling's customers. Mileto then picked up \$60,000 contained in a shoe box wrapped in a distinctive striped paper (Tr. 650-652). After Mileto and Conforti returned to New York with the money, Mileto obtained an additional \$17,000, which was added to the \$60,000 in the shoe box and covered with the same wrapping paper (Tr. 691). Conforti and Mileto then drove to Spring Street, where Conforti waited while Mileto entered Sperling's apartment building. Within 15 or 20 minutes Conforti saw Mallah leave carrying the box wrapped in the same paper (Tr. 654-655). It was also during the summer of 1971 that Lipsky observed Pacelli meet with Sperling, Louis Mileto and Mallah on numerous occasions at Ballantine's barber-shop (Tr. 87, 94-96, 134, 148-149).

Shortly before Christmas, 1971, Cecile Mileto went to 5 Spring Street with her husband. Seated by themselves in the kitchen of the apartment were Sperling and Mallah. Sperling counted a large sum of money, and when he finished, stated that "\$75,000 isn't too bad a haul" (Tr. 46-50). The \$75,000 was put into an attache case which Mallah took with him when he left the apartment (Tr. 50).

In February, 1972 Conforti was present at 5 Spring Street when Mallah and Sperling were in the bedroom talking to Louis Mileto following the latter's arrest. Conforti overheard Sperling berating Mileto in Mallah's presence for having extra packages of heroin which Sperling had discovered when Conforti, the day before, delivered the heroin stored by Mileto in Zelma Vance's apartment. Conforti also heard Sperling (who apparently concluded that Mileto had been stealing some of his heroin and selling it on his own) at that time tell Mallah, "I told you so," to which Mallah replied, "What could you do?" (Tr. 699-700).

On August 16, 1972 Patrolman Lino, secreted in a car parked in front of the barbershop at 844 Seventh Avenue, overheard a conversation between Sperling and Mallah which went as follows:

Sperling: "I got to have the stuff."

Mallah: "Don't worry about it."

Sperling: "Fifty thou, right."

Mallah: "Yes, right, fifty-fifty."

Sperling: "But I got to have it. You know I need it."

Mallah: "Don't worry about it. I'll see the people this afternoon, tonight or early tomorrow. You should have it (Tr. 1182).

Sperling: "But I need it."

Mallah: "Don't worry about it. If the people were straight, if they are not on the run we should have it."

Patrolman Lino minutes later overheard co-conspirator Norman Goldstein ask Barney Barrett, "Are they going to get it?", to which Barrett replied that he didn't know. Goldstein then sent Barrett back into the bar, which Sperling and Mallah had entered, to find out. Barrett came out shortly and told Goldstein, "Yes, we should have it tomorrow" (Tr. 1180-1185). Photographs taken at the time of these conversations show Mallah and Sperling standing next to the car in which Patrolman Lino was hidden and also show Barrett and Goldstein close by (Tr. 1135-1136, 1189; GX 61B, 61C, 61D). Patrolman Lino also testified that the word "stuff" in the Mallah-Sperling conversation referred to a quantity of narcotics (Tr. 1188-1189).\*

In November, 1972 Conforti, Spada, Schworak, Sperling and Mallah were seated together at a table in the Stage Delicatessen. Barrett in Mallah's presence instructed Conforti on the procedure to be followed should Conforti run low on mix for narcotics (Tr. 717).

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\* Since Mallah before this conversation had asked Sperling if he had enough money for 8-10 packages of white powder and had on two previous occasions received over \$150,000 from Sperling, the jury could have inferred—even without Patrolman Lino's testimony—that "stuff" referred to narcotics and not "fifty thou" worth of non-contraband commodity.



### **a. Flight and use of false identities**

On April 13, 1973 a bench warrant was issued for Mallah on Indictment 73 Cr. 330 which charged him, Sperling, Conforti and numerous others with conspiracy to violate the federal narcotics laws. On April 15, 1973 Mallah told Nancy O'Malley in Florida that "there's been some trouble I'll have to leave." On August 13, 1973 Mallah was arrested in New York with more than \$8,500 in his possession and two sets of false identification papers. The agents also found a toupee which he wore while having his picture taken for a bank identification card in the name of Moris Geller, the same name which he had used to rent the apartment in which he was arrested (Tr. 1258-1269; GX 74). At the time of his arrest, Mallah did not possess any identification in his true name.

### **b. Mallah's Testimony**

On direct examination Mallah denied knowing Pacelli. However, Lipsky testified that he had seen Mallah with Pacelli on at least four occasions in the summer and fall of 1971 (Tr. 87, 94-96, 134, 148-149). Mallah denied knowing Joseph Conforti, Louis Mileto, Cecile Mileto or ever being in 5 Spring Street. Yet he was contradicted by Lipsky, Conforti, Cecile Mileto, Sergeant De Luca and Cecile Mileto's son, Mark Miklitsch, who all placed him in conversations with Louis Mileto in 1971 and in 5 Spring Street during that same year (Tr. 46-48, 50, 87, 94-96, 134, 148-149, 204-205, 654-655, 699-800, 717, 1474, 1475-1476, 1480-1483).

The appellant Mallah's contention that the sum total of this evidence, even when viewed in a light most favorable to the Government, was insufficient to convict him of the conspiracy charge is without merit. Even without any hearsay declarations by Mallah's co-conspirators the evidence overwhelmingly established his guilt. *United States v. Barrera*, 486 F.2d 333, 337-338 (2d Cir. 1973).

### c. The hearsay declarations

During one of their trips to Ballantine's barbershop in the summer of 1971 to obtain narcotics Lipsky asked Pacelli to identify the people standing in front of the barbershop with Sperling. Pacelli then told Lipsky that one of the persons was "Louis" and that "Louis works for Herby" (Tr. 95). Lipsky then asked Pacelli "who's that other guy, with the bald head and the suntan and yellow sunglasses?" Pacelli then told Lipsky "that's Benny Mallah, Herby's junk partner" (Tr. 95-96).

In July, 1971 Conforti went to Philadelphia with Louis Mileto where the latter delivered a kilogram of heroin to Sperling's customers. After the delivery Mileto showed Conforti a box containing \$60,000 (Tr. 650-652). When Conforti asked if the money was for Sperling, Mileto said, "No, its going to Bennie, one of his partners" (Tr. 653).

During the return trip to New York, Conforti asked Mileto who Bennie was. Mileto stated that "Bennie was Herbie's partner, his backup man for money problems if you needed money in the junk business, Bennie was there to give him money." And that "this money was to be delivered to Bennie" (Tr. 653). In New York Mileto picked up an additional \$17,000, which was placed in the same shoe box and wrapped with the same paper. Mileto and Conforti then drove to Spring Street where Conforti remained in the car while Mileto went into Sperling's building. Some 15 or 20 minutes later Conforti saw Mallah exit the building carrying the box of money which he recognized because of paper with which it was wrapped. When Mileto returned to the car, Conforti asked him "who is that guy carrying the money." Mileto told Conforti that "it was Ben Mallah."

The threshold question which must be resolved by the trial judge before the hearsay declarations of co-conspira-

tors be considered by the jury is whether the Government has shown by a fair preponderance of the independent evidence that the accused has associated himself with the illegal venture. *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir.), *cert. denied*, 397 U.S. 1028 (1969); *United States v. Calacro*, 424 F.2d 657, 660 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970); *United States v. Calabro*, 449 F.2d 885, 889 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). The independent non-hearsay evidence against Mallah as set out above more than amply satisfied the Government's burden. *United States v. Calabro*, *supra*, at 889. *United States v. Grant*, 462 F.2d 28, 33 (2d Cir.), *cert. denied*, 409 U.S. 914 (1972); *United States v. Cassino*, 467 F.2d 610, 616-618 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); *United States v. Ruiz*, 477 F.2d 918 (2d Cir.), *cert. denied*, —U.S.— (1973).

Mallah, relying on *United States v. Puco*, 476 F.2d 1099 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973), further contends that these hearsay statements should not have been admitted because they allegedly lacked "sufficient indicia of reliability" and were both "crucial" to the prosecution and "devastating" to the defense.

There is no requirement, however, that the trial judge must find, before admitting a co-conspirator's hearsay declaration, that it is neither "crucial" to the Government's case nor "devastating" to the defense. *United States v. Puco*, 476 F.2d 1099, *on petition for rehearing*, 476 F.2d 1106, 1107 (2d Cir. 1973); *United States v. Manfredi*, 488 F.2d 588, 596 (2d Cir. 1973). *United States v. Cohen*, 489 F.2d 945, 950 (2d Cir. 1973).

Nor is there any requirement that the trial judge separately find that the hearsay declaration possesses "sufficient indicia of reliability". While the original opinion of the panel in *Puco* suggested such a requirement, the additional opinions filed in connection with the petition for rehearing and a petition for rehearing *en banc* make clear that no

majority of the active judges of this Court has expressed itself in favor of abandoning prior settled law to the contrary. Moreover, of those judges who expressly stated their views on the question, four have rejected the contention that *Dutton v. Evans*, 400 U.S. 74 (1970) casts any doubt whatsoever on the traditional formulation of the co-conspirator exception in this Circuit\* and only two have even implicitly taken a contrary view.\*\*

Furthermore, as far as Mileto's statements to Conforti are concerned, there was ample support for their reliability. On the same day when Mileto told Conforti that the \$60,000 received in Philadelphia for the sale of heroin deal was destined for Sperling's partner and that Mallah was Sperling's "junk partner," Conforti observed Mallah exit Sperling's house carrying the sealed box in which Mileto had placed the \$77,000. In addition the statements attributed to Pacelli and Mileto were, at the time they were made, against the declarant's penal interest. Pacelli's statement may be so characterized because it showed that he had a detailed working knowledge of major narcotics violators. Mileto's statements to Conforti were against his penal interest for the same reason and because they were admissions that Mileto himself was a narcotics courier for Sperling. *United States v. D'Amato*, 493 F.2d 359, 365 (2d Cir. 1974).

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\* See dissenting opinion of Lumbard, *J.* on petition for rehearing, *Id.* at 1108, and dissenting opinion of Friendly, *Ch. J.*, joined in by Timbers and Hays, *CJJ.* on petition for rehearing *en banc*, *Id.* at 1111.

\*\* Judge Feinberg, the author of the panel's original opinion, stated in his additional opinion on petition for rehearing that with infrequent exceptions, a determination that a statement was made in furtherance of the conspiracy will by itself provide the necessary indicia of reliability, *Id.* 1107-08. Judge Oakes, a member of the original panel in *Puco*, writing in a subsequent case, *United States v. D'Amato*, 493 F.2d 359, 365 (2d Cir. 1974), observed that the traditional rule could be applied in a straightforward manner to co-conspirator declarations which were against the penal interest of the declarant when made.



It is undisputed that the hearsay statements at issue were uttered by members of the conspiracy and during its existence. It is equally clear that they were made in furtherance of the conspiracy, since they identified Mallah's membership and role within the illicit combination and thus explained his presence to Lipsky and Conforti, then new members. Under the circumstances, they were admissible. *United States v. Sansone*, 231 F.2d 887, 892 (2d Cir.), cert. denied, 351 U.S. 987 (1956).

Mallah concedes that "there is an arguable basis for a finding that [he] had some knowledge of the existence of the conspiracy" (Mallah Br. at 34). He also concedes that the proof showed that he supplied huge sums of money to Sperling which he knew were used to finance Sperling's large scale purchases of drugs. The argument that these facts do not establish Mallah's membership in the conspiracy rests on the contention that there was no proof that "the supply and return of money have any relation to the success of the conspiracy" (Mallah Br. at 36). Surely, however, the jury was entitled to infer that Sperling's ability to buy large quantities of narcotics, at the very least in part, depended on the large sums of money which Mallah could and did supply. Mallah himself recognized the critical role which he played in the illegal venture, as the overheard conversation of August 16, 1972 plainly reveals. Mallah's conversations with Sperling, his presence at the meeting where narcotics were in plain view and at meetings when the details of this narcotics conspiracy were discussed, including the one in which Mileto was accused of stealing Sperling's narcotics and the meeting at which Barrett instructed Conforti on the procedure to be followed if he ran out of mix, together with the evidence of his flight and the use of false identities to prevent apprehension, demonstrate the fatuousness of his suggestion that he was merely a money lender "indifferent to the outcome or success of the conspiracy" (Mallah Br. at 36).

## 2. The evidence at Trial established the existence of a single conspiracy

Mallah also argues that the evidence at trial established two conspiracies. The argument must fail. The proof was unambiguous as to the scope of the conspiracy, which was to distribute large amounts of heroin and cocaine for enormous profit. *United States v. Guanti*, 421 F.2d 792, 801 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970). Its common aim and "ultimate purpose [was] the placing of the forbidden commodity into the hands of the ultimate purchasers." *United States v. Agueci*, 310 F.2d 817, 826 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

The evidence established that Pacelli and Sperling joined together in a "vertically integrated loose-knit combination" to purchase and sell at a profit huge quantities of heroin and cocaine. *United States v. Bynum*, 485 F.2d 490, 495 (2d Cir. 1973). Sperling and his "partner," Ben Mallah, and Pacelli and his "partners," Abby Perez and Al Bracer, were the "core operators" of this illicit scheme.

Both Pacelli and Sperling, in addition to their respective "partners," brought to their illicit "combination" a team of narcotics workers and "stash" custodians. Among Pacelli's subordinates were Lipsky, Bayron, Weyl and the Bassis. Those under Sperling and his partner Mallah's control were Mileto, Conforti, Goldstein, Schworak, Spada, Caruso, Cecile Sperling and Zelma Vance.

Pacelli and Sperling both dealt in heroin and cocaine. The success of their activities depended upon their continued ability to satisfy the needs of their customers for both drugs. Pacelli, with his good cocaine connections, was able to supply cocaine to Sperling, and Sperling, with his good heroin connections, could provide Pacelli with heroin. Thus, each of the two groups acted as the customer and supplier of the other, and was therefore doubly dependent on each other

for the success of the illegal business. *United States v. Aguecci*, *supra*, 310 F.2d at 827; *United States v. Bynum*, *supra*, 485 F.2d at 495-496. The activities of these two groups were thus interconnected in time, in place and in function. Contrast *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied* as *Mogavero v. United States*, 379 U.S. 960 (1965); *United States v. Russano*, 257 F. 2d 712 (2d Cir. 1958).

All of the defendants here spent considerable time in or near Ballantine's barbershop, the hub of the Sperling-Mallah group's operations. The Government proved four specific multi-kilogram narcotics transaction between Pacelli and Sperling each of which began or ended at or near the barbershop and on three of these transactions Pacelli was seen meeting with the defendant Mallah and with Sperling. Lipsky also testified to numerous multi-kilogram narcotics sales to the defendant Catino in 1971 at a Club on 115th Street. It also was established that Catino himself frequently spent time at the barbershop in the summer of 1971 in the company of Sperling, Louis Mileto and Norman Goldstein (Tr. 207-208). On one of those occasions Louis Mileto was heard asking Catino if "he did what he was supposed to" (Tr. 209). The defendant Barrett, of course, worked directly for Sperling. Each of the defendants dealt, as did Sperling and Pacelli with each other, in some aspect of the supplying of large quantities of narcotics to the core group or in Mallah's case, supplying large sums of money to finance Sperling narcotics purchases, the preparation or distribution of large quantities of narcotics by the core group, or the receipt of large quantities of narcotics from the core group or its customers. *United States v. Vega*, 458 F.2d 1234 (2d Cir. 1972), *cert. denied* as *Guridi v. United States*, 410 U.S. 982 (1973). Each of them could not but have been aware that he was participating in a scheme in which there were many suppliers to and purchasers from the core group, and this knowledge, coupled with each defendant's ac-

tivities, permitted the jury to find, under the proper instructions, that the defendants were involved in a single conspiracy. *United States v. Bruno*, 105 F.2d 921 (2d Cir.), *rev'd, on other grounds*, 308 U.S. 287 (1939); *United States v. Tramaglino*, 197 F.2d 928 (2d Cir.), *cert. denied* 344 U.S. 864 (1952); *United States v. Rich*, 262 F.2d 415 (2d Cir. 1959); *United States v. Ariles*, 274 F.2d 179 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States v. Agueci, supra*; *United States v. Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States v. Bynum, supra*; *United States v. Cirillo*, 468 F.2d 1233 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States v. Arroyo*, Dkt. No. 73—2193 (2d Cir., March 22, 1974), Slip. Op. at 2314-15.

But even if more than one conspiracy was proved, reversal is not required. "[T]he test for reversible error is not whether more than one conspiracy has been proved, but whether such a variance resulted in substantial prejudice to the appellants." *United States v. Agueci, supra*, 310 F.2d at 827. Accord, *United States v. Vega, supra*, 458 F.2d at 1236. Mallah has made no showing that the alleged variance between the conspiracy charged and what he claims was proved at trial resulted in the kind of prejudice which would warrant reversal. *United States v. Calabro, supra*, 467 F.2d at 983.

## POINT II

**Mallah was not entitled to dismissal of the conspiracy count because the trial court dismissed the substantive counts against him.**

Upon Mallah's motion at the conclusion of the Government's direct case, Judge Pollack dismissed the three substantive counts naming Mallah but, at the same time, denied a motion to dismiss the conspiracy count against him upon which he stands convicted. Mallah here argues that dis-



missal of the substantive counts, required the trial court as a matter of law to dismiss the remaining conspiracy count. The failure to do so, appellant contends, violates the principle of collateral estoppel and, further, the principle that in a criminal case, a trial judge sitting as the trier of the facts may not render verdicts on separate counts which are inconsistent with one another. The attack is without merit.

Counts Five, Six and Seven charged Mallah and Pacelli with distributing and possessing with the intent to distribute one kilogram of cocaine in July, 1971 (Count Five), two kilograms of heroin in November, 1971 (Count Six) and a kilogram of cocaine in December, 1971 (Count Seven). The proof at trial with respect to each of these counts was the testimony of Barry Lipsky who testified that, at Pacelli's direction, he either picked up heroin or, in the case of Counts Five and Seven, delivered cocaine. Each transaction began or ended at the Ballentine's barbershop followed, on each occasion, by a trip by Pacelli and Lipsky to Sperling's apartment to deliver or receive payment for the narcotics transferred between Sperling and Pacelli. During each of the three transactions, Lipsky testified that he observed Pacelli meet with Sperling and Mallah at the barbershop either before or after the particular transaction (Tr. 86-90, 93-94, 131-134, 144-148).

The Government conceded below that there was no direct proof that Mallah himself actually possessed or distributed the narcotics charged in Counts Five, Six and Seven. The Government contended, however, that those counts should be submitted to the jury against Mallah under the principles established in *Pinkerton v. United States*, 328 U.S. 640 (1946). Judge Pollack declined to do so, but did not articulate the reasons why he dismissed the substantive counts.

Mallah's contention that Judge Pollack's dismissal of the substantive counts against him estopped the trial court from submitting the conspiracy count to the jury merits little discussion. Collateral estoppel does not apply to jury verdicts rendered on separate counts at the same trial. *United States v. Zane*, Dkt. No. 73-2401 (2d Cir., April 1, 1974). See *United States v. Schor*, 418 F.2d 26, 28 (2d Cir. 1969); *United States v. Carbone*, 378 F.2d 420, 422 (2d Cir.), *cert. denied*, 389 U.S. 914 (1967); *United States v. Giuliano*, 348 F.2d 217, 220 (2d Cir.), *cert. denied*, as *Phezioso v. United States*, 382 U.S. 939 (1965); *United States v. Dovico*, 329 F.2d 52 (2d Cir. 1964); *United States v. Klein*, 247 F.2d 908, 919 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). In any event, in dismissing Counts Five, Six and Seven, Judge Pollack made no finding that the dismissal was required for lack of sufficient evidence of Mallah's membership in the conspiracy. On the contrary, his ruling implies that he concluded that a reasonable jury, on the basis of *all* the evidence, could find that Mallah was a member of the conspiracy charged.

Appellant's second contention in this regard carries him no further. Trial courts, unlike trial juries, of course, must render consistent verdicts. *E.g.*, *United States v. Maybury*, 274 F.2d 899 (2d Cir. 1960). Judge Pollack's dismissal of the substantive counts against Mallah, however, was not necessarily inconsistent with his submission of the conspiracy count to the jury.

To be held responsible for substantive offenses committed during the course of a conspiracy, a conspirator must be a proven member of the conspiracy at the time of the commission of the substantive offenses. *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946). Although he did not explain the basis for his ruling, Judge Pollack quite properly could have determined that there was insufficient evidence of Mallah's membership in the conspiracy during the period from July to December, 1971—the limited time period in which the offenses alleged in Counts Five through Seven

occurred—to warrant submitting those counts against Mallah to the jury. Such a finding is perfectly consistent with a further finding that the overall evidence pertaining to Mallah's membership in the conspiracy, which spanned the period from 1971 through 1973, was more than sufficient to permit the jury to find him guilty.

### POINT III

#### **The trial court did not abuse its discretion in excluding extrinsic evidence of Conforti's participation in an attempted extortion of Sam Kaplan.**

Appellants each contend that the trial court abused its discretion by excluding extrinsic evidence of an extortion attempt upon Sam Kaplan in which Joseph Conforti, a Government witness, participated. The ruling was proper.\*

To impeach his credibility, Mallah's defense counsel cross-examined Conforti about a telephone conversation between Conforti and Kaplan, which the latter had tape recorded. Conforti testified at length concerning the conversation. While present in the courthouse during the *Sperling* trial,\*\* Conforti saw Jack Spada, then a fugitive defendant, from a third floor window. Conforti testified that he advised the Government of this brief glimpse of Spada. When the trial concluded, however, Conforti, without telling the Government, telephoned Spada at a number in Harlem, and was told by Spada to contact Kaplan, a defendant acquitted in the *Sperling* trial, and tell him that

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\* All appellants raise this issue, even though Conforti's testimony concerned only Mallah and Barrett. Pacelli and Catino proffer a derivative claim based upon their membership in the conspiracy about which Conforti gave testimony.

\*\* The term "Sperling trial" refers to the trial of Herbert Sperling and others, including Sam Kaplan, on Indictment 73 Cr. 441 which took place from June 18 to July 12, 1973.

for \$10,000 Spada "would keep his mouth shut" about a delivery to Kaplan of one and a half kilograms of heroin made by Conforti in the company of Spada. Acting as instructed, Conforti telephoned Kaplan and relayed Spada's threat to Kaplan.\* Conforti also told Kaplan that, were Spada to tell the Government of the delivery, Conforti would be questioned and he would have to admit making the delivery as well.\*\* Kaplan told Conforti that he had no such money. Conforti testified that within a few days or a week, he called Spada back and reported what Kaplan had told him. Spada told Conforti not to worry about it.

After lengthy cross-examination of Conforti had elicited in detail the extortion threat and Conforti's role in relaying it to Kaplan, Mallah's counsel sought to introduce in evidence the tape recording of the telephone conversation between Kaplan and Conforti. Judge Pollack excluded the tape-recording, but ruled that counsel could conduct further cross-examination on the basis of various statements made by Conforti during the telephone conversations which concerned matters unconnected with the extortion attempt (Tr. 802-821). Cross-examination then continued concerning various of these statements, as well as the extortion threat, aided by the transcript of the tape-recorded conversation, which was used both to refresh Conforti's recollection and to quote from verbatim in formulating the questions put to Conforti (Tr. 802-39).

After the conclusion of Conforti's testimony, Judge Pollack advised defense counsel that the Government had obtained a coroner's report that established that Spada died

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\* Contrary to the factual statements in the Pacelli and Catino briefs, Conforti could not recall when he made the telephone call to Kaplan, except that it was after the *Sperling* trial.

\*\* Conforti testified at the *Sperling* trial, but gave no testimony with respect to a delivery of heroin to Kaplan. Conforti testified below that he withheld such evidence in the *Sperling* case to help Kaplan, a friend (Tr. 784, 786).



on October 28, 1973 (Tr. 978-880). Mallah's counsel thereafter sought on the defense case to introduce the tape recorded conversation and, additionally, to present evidence that the conversation between Conforti and Kaplan and Spada's death had occurred on October 28, 1973. The purpose of the latter evidence, counsel argued, was to contradict directly Conforti's testimony that he made a second telephone call to Spada subsequent to the Kaplan conversation and, inferentially, that he made the telephone call to Kaplan at Spada's behest (Tr. 1308-22).

Trial judges possess wide discretion in determining whether extrinsic evidence should be excluded, especially if related to collateral issues. Appellants contend Judge Pollack abused his discretion when he excluded from evidence the tape-recorded conversation between Kaplan and Conforti and proof of its occurrence and Spada's death on October 28, 1973. The contention must fail for several reasons.

Even assuming the evidence related to an issue which was not collateral, the exclusion of the taped conversation between Conforti and Kaplan was proper, since the conversation was the subject of a searching inquiry on cross-examination. Conforti admitted the fact of the extortion threat and testified in detail to his participation in making the threat. Hence, there was no necessity for Judge Pollack to admit into evidence the tape-recorded conversation itself which was cumulative.

The two cases principally relied upon by appellants in asserting that the exclusion of the tapes was error, *United States v. Haggett*, 438 F.2d 396 (2d Cir.), *cert. denied*, 402 U.S. 946 (1971) and *United States v. Briggs*, 457 F.2d 908 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972), are inapposite for that very reason. In *Haggett* the Government witness *denied* on cross-examination that he had endeavored to persuade three people to testify falsely against the de-

fendant. This Court held that it was error to preclude defendant from calling these three persons to testify that the witness had done so.\* Likewise, in *Briggs*, the defense witness *denied* on cross-examination that he had told Government agents that the defendant had twice threatened him to give exculpatory testimony for the defendant. This Court held it proper to permit the Government agents to testify that the witness had made such statements to them. In stark contrast, at the trial below, Conforti *admitted* conveying the extortion threat to Kaplan for Spada.

The extortion threat itself clearly was a collateral issue, as were the dates of the telephone call and of Spada's death, since Kaplan was not a defendant in the trial below. Even if it had been proved that Conforti himself had attempted to extort money from Kaplan in return for withholding inculpatory testimony at the *Sperling* trial, that evidence

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\* Catino, in his brief, posits an additional claim. Citing *Haggett*, he argues the extortion threat was admissible to impeach other Government witnesses, even though there was no evidence that they were involved in the extortion threat. The claim is not only specious on its face, but it is not supported by *Haggett*. There, the defendant, a bank officer convicted of embezzlement, sought to show that a prosecution witness, who also was an officer of the same bank, had attempted to induce three borrowers from the bank to testify falsely that the defendant had demanded money from them before they could obtain their loans. In return for their perjured testimony, these uncalled witnesses were promised favored treatment by the bank in connection with their then outstanding loan balances. In holding that the trial judge erred in excluding their testimony, this Court concluded that the evidence was not only admissible to impeach the witness who had sought to suborn perjury, but was relevant to the jury's assessment of the credibility of other Government witnesses who had testified as to the misapplication of funds from the bank, since the jury might have found that they were persuaded by the bank, through its officers, to testify untruthfully. Here, there is nothing in the record to show that Conforti had any relationship to any other Government witness which even remotely suggests that *Haggett* might be applicable.

would be inadmissible at the trial of these appellants.\* *United States v. DeSapio*, 456 F.2d 644 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972). This Court in *DeSapio* held that extrinsic evidence that a Government witness had once suborned perjury was inadmissible to impeach that witness at a trial of a different defendant. 456 F.2d at 648 and n.1.\*\*

In any event, Conforti's testimony admitting participation in the extortion attempt provided the jury with more than sufficient evidence to appraise his credibility and any bearing that this incident might have had on his motive to testify. See *United States v. Blackwood*, 456 F.2d 526 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972); *United States v. Campbell*, 426 F.2d 547 (2d Cir. 1970).\*\*\*

#### POINT IV

#### **The cross-examination of Barry Lipsky was not improperly restricted.**

Mallah, Catino and Barrett argue that the trial judge improperly curtailed the scope of their cross-examination of Barry Lipsky by forbidding questions about the facts

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\* Appellants' claim that the extortion threat was made by Conforti alone is certainly undercut by the fact that the extortion threat occurred *after* Conforti had testified without implicating Kaplan in the *Sperling* case.

\*\* Since Conforti gave no testimony at trial implicating either Pacelli or Catino, their claims in this regard are even farther removed than the situation before this Court in *DeSapio*.

\*\*\* Proof of the date of the telephone conversation between Kaplan and Conforti would have been no easy matter. Mallah's counsel conceded that the purported date of October 28, 1973 could not be established from the tape-recorded conversation. To prove the call occurred on that date, Mallah's counsel proposed calling Kaplan, or some other witness, to testify to the date of the call (Tr. 1308-21). Of necessity, the Government would have been required to counter such evidence. Judge Pollack was well within his discretion in preventing this excursion into collateral issues.

underlying Lipsky's conviction for manslaughter in Nassau County. Judge Pollack's refusal to allow inquiry into the lurid details of the homicide and permit the defense to shift the focus of the trial from the defendants' narcotics activities to Lipsky's participation in the killing was within his discretion and entirely proper.

The trial judge refused to permit inquiry of Lipsky on such questions as whether he drove the car to the scene of the killing, doused the victim's body with gasoline, lit a match, etc. (Tr. 443-444). Appellants claim that these details would have shed additional light on Lipsky's possible bias or motive in testifying for the Government and that the ruling prohibiting this line of inquiry denied them a fair trial. However, the record does not support the contention that disclosure of the details of the homicide was essential to the jury's ability to appreciate fully Lipsky's motive to testify.

It is well settled that control of cross-examination is within the discretion of the trial judge. *United States v. Mahler*, 363 F.2d 673, 678 (2d Cir. 1966). In *United States v. Campbell*, 426 F.2d 547, 550 (2d Cir. 1970), this Court expressed the applicable standard as follows:

"In determining whether the trial judge has abused his discretion in limiting the introduction of such evidence the issue is whether the jury was otherwise in possession of sufficient information concerning formative events to make a 'discriminating appraisal' of a witness' motives and bias."

Here the jury had abundant evidence from which it could "make a 'discriminating appraisal' of [Lipsky's] motives and bias." *Id.* Over three hundred pages of the trial transcript in this case were devoted to the cross-examination of Barry Lipsky. During both his direct and cross-examination Lipsky, among other things, admitted testifying falsely



before a Florida Grand Jury in 1970 (Tr. 57, 170, 410, 449, 532-533); lying to a probation officer in Florida (Tr. 523-525); having been convicted in Miami, Florida of conspiracy to transport stolen securities in interstate commerce (Tr. 57), and lying to the judge who sentenced him (Tr. 462); testifying falsely as to promises made to him in two trials involving Pacelli in the Southern District of New York in June and December of 1972 (Tr. 58, 417-425, 518); having been examined by psychiatrists (Tr. 301-302); using cocaine and marijuana (Tr. 321); receiving promises that he would not be prosecuted for his narcotics activities (Tr. 386) and not expecting to be prosecuted for perjury (Tr. 427-428) or tax evasion (Tr. 389) or for defrauding a person of \$20,000 in Miami, Florida in 1970 (Tr. 289-290); and having been told in 1972 that he owed \$44,000 in taxes which he expected he would not have to pay (Tr. 277-279).

Lipsky also admitted that he had been indicted for murder in Nassau County in 1972 (Tr. 58, 187); he subsequently had pleaded guilty to a charge of first degree manslaughter (Tr. 57, 462); he had been sentenced to an indeterminate term of up to twenty years (Tr. 58); and that he expected that the parole board would be told of his cooperation (Tr. 179, 491-492). He also stated that when he was first arrested in Nassau County, he felt he was in serious trouble and would have to spend a long time in jail (Tr. 463-464) and that the Nassau County authorities were out to get him (Tr. 471). Lipsky further testified that an Assistant United States Attorney had told the sentencing judge in Nassau County that he had cooperated with the Federal Government (Tr. 481).

Lipsky also was cross-examined extensively about two letters he had written to Assistant United States Attorneys Gerald Feffer and Robert Morvillo in December, 1972. In the letter to Morvillo he expressed his appreciation for all the efforts made by Morvillo and others in his behalf (Tr. 476-478).

The jury thus had more than ample evidence from which they could evaluate Lipsky's motive to testify falsely, a fact which the defense commented upon at great length during summation (Tr. 1521-1526, 1538-1539). In addition, Judge Pollack cautioned the jury to weigh accomplice testimony with great care (Tr. 1662).

Furthermore, had defense counsel been allowed to question Lipsky about the details underlying his manslaughter conviction, it is quite possible that the cross-examination might have revealed that Pacelli had participated in the murder and had used Lipsky to assist him.\* Precluding examination about the facts of this crime thus served to protect Pacelli's right to a fair trial.

In view of the possible prejudice to Pacelli, and because the jury had more than sufficient material with which to gauge Lipsky's motives, there was no error in the trial court's limitation on the scope of Lipsky's cross-examination. *United States v. LaSorsa*, 480 F.2d 522, 528-29 (2d Cir.), cert. denied, 414 U.S. 855 (1973); *United States v. Mobley*, 462 F.2d 69, 71-72 (2d Cir. 1972); *United States v. Blackwood*, 456 F.2d 566, 529-30 (2d Cir.), cert. denied, 409 U.S. 863 (1972); *United States v. Russo*, 442 F.2d 498 (2d Cir. 1971), cert. denied, 404 U.S. 1023 (1972).

## POINT V

**The prosecutor's remarks in summation did not deprive any defendant of a fair trial.**

Pacelli and Mallah contend that certain remarks of Government counsel during summation deprived them of a fair trial. It is argued that the prosecutor improperly attempted to bolster Lipsky's credibility and to suggest to the jury that Pacelli had previously been convicted. Although

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\* See *United States v. Pacelli*, 491 F.2d 1108 (2d Cir. 1974).

the challenged remarks were imprudent, they were designed to answer an unfair and misleading argument made by Pacelli's counsel during summation and any possible prejudice was cured by the trial judge's prompt and emphatic instruction to disregard the objectionable comment.

On cross-examination Pacelli's counsel asked Lipsky about a meeting involving Lipsky, Pacelli and co-conspirator Luis Valentine at the Yellowfingers Cafe in Manhattan in late September, 1971. Lipsky stated that later on that same day he drove to his apartment, picked up a quantity of cocaine which he placed in the car and returned to Yellowfingers where he gave Pacelli the keys to the car (Tr. 346-350).

At Pacelli's request the testimony of Joseph Nunziatta, a deceased New York City detective, given at an earlier trial, was received in evidence. In that testimony Nunziatta described his surveillance of Luis Valentine on September 28, 1971. Nunziatta observed Valentine driving a blue Pontiac to 61st Street and Third Avenue, where he parked and locked the car and then walked to and entered the Yellowfingers Cafe. Later he observed Valentine hand something to an unknown male \* and the male then entered Valentine's car and drove to 81st and Third Avenue where he parked the car and entered 1420 Third Avenue. Approximately 20 minutes later the unknown male exited 1420 Third Avenue entered the car and drove back to Yellowfingers where Nunziatta observed him park, lock the car and enter Yellowfingers. He observed Valentine leave Yellowfingers a few minutes later, enter the blue Pontiac and drive away (Tr. 1457-1465).

In his summation Pacelli's counsel stated:

"Now ladies and gentlemen, this trial, Mr. Pacelli's own trial, you didn't hear Mr. Lipsky say anything

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\* The unknown male was Barry Lipsky.

about Mr. Pacelli and Mr. Valentine and Yellowfingers. You know why? Because now Mr. Lipsky, I suggest to you ladies and gentlemen, Mr. Lipsky now knows that he was under surveillance by these detectives. He knows that he can't tell that story anymore because he can be refuted by the detectives.

"He testified that there was a clear view in and out of Yellowfingers. You could see who was there, who was not. These detectives didn't see any Vincent Pacelli in there because he was not there, so Lipsky just leaves that out of the story" (Tr. 1519-1520).

At the beginning of his summation, the Assistant United States Attorney replied to the above argument as follows:

"I recall Mr. Duke told you on one occasion that he read some testimony yesterday into the record that was about a surveillance of a Valentine buy at the Yellowfingers Cafe, and he read the whole thing and he said his conclusion was that Mr. Lipsky did not testify about that at this trial because he had found out that he was under surveillance. Well the reason he didn't testify about it at that trial was that those persons were already convicted as Mr. Duke well knew, and there was no reason to testify."\*

All defense counsel objected at this point. Judge Pollock immediately and emphatically instructed the jury to disregard this comment as follows:

"Ladies and Gentlemen, it is my duty again, despite the fact that I have said this before, you are admonished, you are instructed, you are implored, using any word that I can indicate to you, to erase from your minds any of the argument of counsel on either side,

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\* Co-conspirator Luis Valentine was convicted along with Sperling and nine other defendants on July 12, 1973 after a trial on Indictment 73 Cr. 441.



and particularly that last comment which has nothing and no support in the evidence. It is the evidence in this case which governs, and nothing which has run outside of the evidence and there have been indications on both sides now of a comment which should not have been made that doesn't relate to the evidence.

"Let's get on with the evidence Mr. Lavin, and your comments about the evidence, and not things that are not in evidence. Let's not have it happen again" (Tr. 1602-1603).

In assessing the impact of Government counsel's remark, which improperly referred to a matter outside the record, the summation to which it was directed cannot be ignored. The argument made by Pacelli's attorney was unfair in at least two respects. The contention that Lipsky "left out" the Yellowfingers transaction involving Valentine and Pacelli in his direct testimony assumes that he was asked about it in the first place, which is simply not true. Secondly, since Detective Nunziatta had died before the trial below began, it was highly misleading for defense counsel to argue to the jury that Lipsky "can't tell that story any more because he can be refuted by the detectives." Furthermore, Nunziatta never entered Yellowfingers, and thus could neither corroborate nor contradict Lipsky's testimony that Pacelli was there with himself and Valentine.

Pacelli's contention that the prosecutor's comment suggested to the jury that he had previously been convicted for the Yellowfingers' transaction on Lipsky's testimony rests on a strained and artificial reading of the record. Pacelli was not mentioned by name in the challenged comment, and the phrase "those persons . . . already convicted" plainly referred to Valentine and co-conspirator Alberto Gonzalez mentioned in Nunziatta's testimony.

Though the prosecutor should not have referred to any matter outside the record, it is clear that the remark in question was an isolated utterance in a summation which is not otherwise challenged on this appeal and which concluded a lengthy, hard fought trial. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1940); *United States v. Tortora*, 464 F.2d 1202, 1207 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972); *United States v. Ramos*, 268 F.2d 878, 880 (2d Cir. 1959).

Furthermore, unlike *United States v. Gonzalez*, 488 F.2d 833 (2d Cir. 1973), the objectionable comment here was provoked by the improper and misleading argument of Pacelli's counsel.\* See *United States v. LaSorsa*, 480 F.2d 522, 525-526 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States v. Santana*, 485 F.2d 365, 370 (2d Cir. 1973).

Finally, any possible prejudice which might have accrued from this remark was adequately dispelled by the trial court's immediate and forceful curative instruction. *United States v. Pfingst*, 477 F.2d 177, 189 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973); *United States v. Miller*, 478 F.2d 1315, 1317-1318 (2d Cir. 1973), *cert. denied*, — U.S. — (1974); *United States v. Sawyer*, 469 F.2d 450 (2d Cir. 1972); *United States v. Semensohn*, 421 F.2d 1206, 1208-1209 (2d Cir. 1970). In view of the overwhelming evidence of the defendants' guilt, it is indisputably clear that "a reversal would be an immoderate penalty." *United States v. Lotsch*, 102 F.2d 35, 37 (2d Cir.), *cert. denied*, 307 U.S. 622 (1939).

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\* The unrestrained quality of the summation of Pacelli's lawyer is illustrated by his accusation that Lipsky and another Assistant United States Attorney were "a couple of crooks" (Tr. 1538), and that the only conspiracy proven was a conspiracy between Lipsky and the same Assistant to obstruct justice and commit perjury (Tr. 1535).

## POINT VI

**None of the other claims have merit.**

### **1. The eight thermometers seized from Catino**

On September 26, 1973, approximately three days after this indictment was filed, Catino was arrested in the Bronx. At that time he was carrying a box containing eight (8) twelve-inch chemical Fahrenheit thermometers, which were received in evidence at trial (Tr. 1250-1257, GX 54A-54H).

Two of the Government's witnesses, Lipsky and Conforti, testified that they had used thermometers to test the purity of heroin and cocaine (Tr. 76-79, 665, 748-749, 758). Furthermore, Conforti had a chemical centigrade thermometer in his possession when he was arrested on April 14, 1973 (Tr. 748, GX 30).

During the defense case Catino called a chemist who testified that the Fahrenheit thermometers seized from him, had a maximum reading equivalent to 148 degrees centigrade.\*

Catino argues that since he was arrested after the conspiracy had terminated, the thermometers constituted evidence of an inadmissible subsequent criminal act offered only to show his propensity to engage in narcotics activities.

Narcotics paraphernalia when legally seized during a lawful arrest is, of course, always admissible. *United States v. Carminati*, 247 F.2d 640 (2d Cir.), cert. denied, 355 U.S. 883 (1957). Assuming *arguendo* that the conspiracy had terminated by the time of his arrest, the ther-

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\* Both Conforti and Lipsky testified that heroin "broke" at about 240 degrees centigrade if it was pure and a centigrade reading below 190 degrees indicated the heroin had been "cut" (Tr. 76-79, 665).

thermometers would have still been admissible against Catino as probative evidence of the existence of the conspiracy and his participation therein. *United States v. Nuthan*, 476 F.2d 456, 459-60 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); See also *Lutwak v. United States*, 344 U.S. 604, 615-18 (1953); *United States v. Bennett*, 409 F.2d 888, 893 (2d Cir.), *cert. denied*, as *Haywood v. United States*, 396 U.S. 852 (1969).

In any event the uncontroverted testimony of Catino's chemist considerably lessened the probative force of the thermometers, leaving the Government with the argument that Catino might have obtained them by mistake (Tr. 1639).

## 2. Lipsky's competency to testify

Catino also argues that because Lipsky had never been prosecuted for his admitted perjuries, he was incompetent to take the oath. There is no merit to this contention.

Judge Pollack correctly charged the jury about the significance of Lipsky's admitted perjuries as follows:

... all the testimony of witnesses or of any defendant who admitted to previous perjury or fabrication should be considered with great care. Again, such a witness may be believed in part or in whole. It is for the jury to determine whether and to what extent testimony from such a source is to be credited (Tr. 1663).

The fact that a witness has admitted perjury or even has been convicted of perjury does not disqualify him as a witness. *United States v. Davis*, 473 F.2d 1023 (10th Cir. 1973). Nor does a witness become incompetent to testify because he has not been indicted for perjury, which he admits. The issue is one of credibility and the weight to be given an admitted perjurer's testimony, for which the jury has sole responsibility. *Hoffa v. United States*, 385



U.S. 293, 310-12 (1966); *United States v. Projansky*, 465 F.2d 123, 136 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States v. Aviles*, 274 F.2d 179, 190 (2d Cir. 1960); *United States v. Reina*, 242 F.2d 302, 307 (2d Cir.); *United States v. Margolis*, 138 F.2d 1002, 1004 (3d Cir. 1943).

### 3. The sale of heroin to Reiter and Carter on February 10, 1972.

Mallah contends that the evidence relating to the sale of 1 kilo of heroin on February 10, 1972, which Louis Mileto delivered to Mark Reiter who, in turn, sold it to an undercover agent, was inadmissible.\* Because Sperling criticized Mileto for having dealt with Reiter after Mileto's arrest, Mallah contends that the transaction was not made in furtherance of the conspiracy (Mallah Br. 72-74). The argument is unpersuasive.

Reiter, as the jury could have found from the evidence, was known by Sperling (GX 65). The heroin sold to Reiter and later seized on February 10, 1972, belonged to Sperling, and it was well within the scope of Mileto's authority to sell this kilo of heroin to Reiter provided that Sperling received his share of the proceeds. The transaction was indisputably within the scope of the objects of the conspiracy. *Cf. United States v. Bynum*, 485 F.2d 490, 498-99 (2d Cir. 1973). There was thus sufficient evidence from which the jury could rationally find that this transaction was an act in furtherance of the conspiracy. The issue was one of fact for the jury to decide. *United States v. Arnone*, 363 F.2d 385, 401 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966).

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\* See *supra*, pp. 22-25.

## CONCLUSION

**The judgments of conviction should be affirmed.**

Respectfully submitted,

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Southern District of New York,  
Attorney for the United States  
of America.*

JAMES P. LAVIN,  
JAMES NESLAND,  
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*Assistant United States Attorneys,  
Of Counsel.*

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\* We feel obliged respectfully to draw to the Court's attention that this brief is being filed on Tuesday, June 18, 1974, the Government having been served with the last of appellants' briefs (Pacelli) on June 5, 1974. Our motion to extend our time to respond in order to give us the customary and anticipated 30 days after receipt of the last appellants' brief was denied. In the 13 days allotted to us, we have been unable to respond to all of the points raised raised by appellants and respectfully request permission to file a supplementary brief after the oral argument.

# AFFIDAVIT OF MAILING

State of New York )  
: ss.:  
County of New York)

JAMES P. LAVIN being duly sworn,  
deposes and says that he is employed in the office of  
the United States Attorney for the Southern District  
of New York.

That on the 20th day of June, 1974 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:  
Nancy Rosner, Esq., Rosner, Fisher & Scribner, 401 Broadway, N.Y., N.Y. 10013  
Gerald L. Shargel, Esq., LaBossa, Shargel & Fischetti, 522 Fifth Avenue, New York, New York 10036  
Robert Mitchell, Esq., 51 Chambers St., New York, New York  
Steven S. Duke, Esq., 127 Wall St., New Haven, Conn.  
And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Sworn to before me this

**JAMES P. LAVIN**

20th day of June, 1974.

JEANETTE ANN GRAYEB  
Notary Public, State of New York  
No. 24-1541575  
Qualified in Kings County  
Certificate filed in New York County  
Commission Expires March 30, 1975